No. 593

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In the Supreme Court of the United States

OCTOBER TERM, 1944

RADIO STATION WOW, INC. (a Nebraska corporation), WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY (a Nebraska corporation), DE E. BRADSHAW, T. E. PATTERSON, FARRAR NEWBERRY, WILLIAM RUESS, W. C. BRADEN, R. E. MILLER, STERLING C. HOLSTON and JOHN J. GILLIN, JR.

Petitioners

v.

HOMER H. JOHNSON

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

BRIEF FOR PETITIONERS

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Petitioners

v.

HOMER H. JOHNSON
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

BRIEF FOR PETITIONERS

INTRODUCTORY STATEMENT

This case is here on certiorari to review the judgment of the Supreme Court of Nebraska entered March 10, 1944, reversing the judgment of the District Court of Douglas County, Nebraska, in favor of petitioners (R. 744) and the judgments entered May 26, 1944, denying rehearing (R. 794) and overruling petitioners' motions to dismiss for lack of jurisdiction over the subject matter (R. 793). The Supreme Court of Nebraska divided four to three in reversing the decision of the District Court (R. 745, 761).

OPINIONS BELOW

The judgment of the District Court of Douglas County, Nebraska is unreported (oral opinion at R. 730; and decree at R. 735).

The majority opinion of the Supreme Court of Nebraska of March 10, 1944, is reported in 13 N.W. (2d) 556 (1944) (R. 745), and the minority opinion at page 564 (R. 761).

The opinion of May 26, 1944, denying the motion for rehearing is reported in 14 N.W. (2d) 666 (1944) (R. 794).

JURISDICTION

The judgments on rehearing and overruling the motions to dismiss for lack of jurisdiction were entered May 26, 1944. Certiorari was granted December 11, 1944. The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, on the ground that the decisions below denied a title, right, privilege, and immunity claimed by petitioners under the Communications Act of 1934, particularly Sections 310(b) and 402(a) thereof.

The judgments below were final, and the federal questions were properly presented. See Parts I and II of Argument (*infra*, pp. 17 to 29).

QUESTIONS PRESENTED

1. Whether the judgment below was final within the meaning of Section 237(b) of the Judicial Code.

2. Whether the federal questions were properly presented below.

3. Whether jurisdiction over a suit to set aside, modify or review an assignment of a radio station license, and a lease of the station facilities, approved by the Commission, can be exercised by a State court in view of Section 402(a) of the Communications Act of 1934.

4. Whether the primary jurisdiction doctrine, applied to Section 310(b) of the Communications Act of 1934 precludes the courts, in private litigation, from passing on the reasonableness or validity of transfers of radio broadcasting stations, after consideration thereof has been given and decision rendered thereon by the Commission from the standpoint of the public interest.

5. Whether, in this particular case, the judgments of the Supreme Court of Nebraska invaded the jurisdiction vested in the Federal Communications Commission under the provisions of the Communications Act of 1934, by annulling the orders of the Commission of December 15, 1942, and January 12, 1943, and by deciding matters affecting the public interest.

6. Whether the judgments of the Supreme Court of Nebraska deprived the petitioners of rights, titles, privileges and immunities set up and claimed under a statute of the United States (Communications Act of 1934) and deprived them of their property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

7. Whether the decisions below violated the Communications Act of 1934, by attributing valuable property interests to a radio station license in violation of the provisions of Sections 301 and 309(b).

STATUTES INVOLVED

Sections 310(b) and 402(a) of the Communications Act of 1934, as amended, provide:

> "310(b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer or control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing.
>
> "402(a) The provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend

any order of the Commission under this Act (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license) and such suits are hereby authorized to be brought as provided in that Act."

Other applicable sections of the act are set forth in Appendix A, *infra*, p. 80 *et seq.*

STATEMENT OF THE CASE

The Parties

1. The respondent, Homer H. Johnson (plaintiff and appellant below) who holds a life insurance certificate in the Woodmen of the World Life Insurance Society, instituted this action on behalf of himself and all other members. No other members have joined.

2. The petitioner, Woodmen of the World Life Insurance Society (defendant and appellee below), is a fraternal benefit society (Ex. 1, R. 40, 41) having approximately 336,000 members, $136,000,000 of assets and $367,000,000 of insurance in force (R. 11, 59).

3. The individual petitioners (defendants and appellees below), except Gillin, are executive officers and directors of the Society, resident in Nebraska (R. 1-2, 60).

4. The petitioner, Radio Station WOW, Inc. (defendant and appellee below) is a Nebraska corporation (R. 1, Ex. 12, R. 148) and the petitioner John J. Gillin, Jr., (defendant and appellee below), is its President and General Manager (R. 141, Ex. 12, R. 148, 157).

Lease of the Station

The Society originally constructed and owned and operated Radio Station WOW from 1923 to 1942 (R. 353-

362). The present facilities were constructed in 1934 pursuant to a construction permit from the Federal Communications Commission at a cost of approximately $175,000, all of which has been written off in prior years (R. 451).

On October 3, 1942, the Society entered into a 15-year lease of the radio station (Ex. 1, R. 21, 22), to Radio Station WOW, Inc., at an average annual rental of approximately $74,000 (Ex. 1, R. 21, 22, 756), and other substantial considerations. The lease covered all of the lessor's radio buildings, its studio equipment, and its transmitting structure and apparatus, together with its contracts with the National Broadcasting Company and others "with reference to broadcasting commercial or other programs" (R. 21-23).

This lease specifically provided:

> "This lease is to become effective and the term thereof shall commence as and when the Federal Communications Commission grants to the party of the second part a license to operate said radio station" (R. 23).

Nature of the Action

This suit was instituted November 23, 1942, to declare illegal and void and to cancel an assignment by the Society to the lessee of the license to operate the broadcasting facilities of Radio Station WOW and the lease of the facilities used by the Society in the exercise of the assigned license. The petition (R. 1), after identifying the parties and describing the radio station and its contractual and fiscal status, identifies the officers of the Society, including those managing the radio station, and sets forth their various salaries from the Society and the station, and alleges the profitable nature of the radio station's operations. In conclusory form is set forth the allegedly unlawful plan of the officers to transfer the station to the lessee, Radio Station WOW, Inc. The organization of the lessee corporation is described, its officers identified, and certain provisions of the lease set forth.

It is then alleged that:

> "On or about October 7, 1942, an application was filed with the Federal Communications Commission of the United States of America by defendant Bradshaw on behalf of the Society and defendant Gillin on behalf of defendant Radio Station WOW, Inc., requesting consent to the assignment by the Society to defendant radio station WOW Inc. of the license of radio station WOW. The reason given for such assignment was that the Society was convinced that defendant Radio Station WOW, Inc. would 'continue to serve the public by rendering a high type program service'." (R. 5-6).

It is further alleged that said application was then pending before the Federal Communications Commission and objections to the granting of consent to the aforesaid assignment of the radio station without a public hearing had been made by Honorable Dan Butler, Mayor of the city of Omaha, Nebraska, "*for the reason that it is contrary to the public interest of the citizens of Omaha, Nebraska*" (R. 6).[1]

It is alleged that "No reasons have been disclosed for the leasing of the radio station other than set forth in the aforesaid application *and such reasons are obviously insufficient*" (R. 6).

The petition further alleges "*The obvious purpose* of the leasing of the station as aforesaid is to make the radio station available to the Consumers' Public Power District and those interested in its acquiring such power facilities *for spreading propaganda* favoring such sale" (R. 9).

There follows the allegation that this proposed use of the radio station as a propaganda mechanism to promote the sale of private power facilities to public ownership groups is contrary to the private interest of the Society "*and to the listeners of the station and to the public generally*" (R. 9).

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[1] All italics herein are supplied.

The petition describes the various officers of the lessee corporation, alleging various connections with and attitudes toward the Consumers' Public Power District and alleges:

> "Defendant Radio Station WOW, Inc. is dominated and controlled by men who have been and now are directly or indirectly connected with the Consumers' Public Power District of Nebraska, or are personally interested in its acquisition of the power facilities serving Omaha, Nebraska and vicinity which are now owned and operated by the Nebraska Power Company" (R. 7).

The petition alleges that the acts of the officers and directors of the Society were "wrongful and unlawful" (R. 10), and that the plan for the transfer of the radio station was "to unlawfully procure for the benefit and profit of themselves, their friends and associates the possession and control of radio station WOW for a grossly inadequate consideration, and in pursuance of such plan and to accomplish its purpose . . ." (R. 4). Except for such conclusory allegations, the petition contains no allegation of fraud or constructive fraud, or any specific allegation as to how the officers and directors of the Society were to benefit from the transaction, except possibly by such benefits as might come to them, as to other citizens, in the alleged proposed use of the radio station in promoting public power operations.

The petition alleges the profitable operations and great value of the radio station, and complains that the lessee lacks financial stability to make its obligations to the Society secure (R. 3, 7).

The petition also alleges the failure of the officers of the Society to notify the membership of the proposed transfer at "a grossly inadequate consideration" and "to a company dominated and controlled by the Society's officers and those interested in the sale of the Omaha power facilities to the Consumers' Public Power District" (R. 9).

Finally, the petition prays

> "... that the aforesaid lease and assignment of license by the Society of its radio station to defendant Radio Station WOW, Inc. be declared illegal and void and the aforesaid lease and assignment be immediately cancelled and terminated; that the defendants be enjoined from transferring by lease, assignment or otherwise, radio station WOW or its license thereto ..." (R. 10).

Orders of the Federal Communications Commission

On October 7, 1942, 47 days before the institution of this suit in the District Court of Douglas County, the Society and lessee had filed a joint application with the Commission for its consent to the assignment of the broadcasting license. The application (R. 376), in accordance with the Commission's rules,[2] was accompanied by a copy of the lease contract and set forth the following data with regard to the finances of Society and lessee, to justify and explain the proposed assignment: complete inventory of station property (R. 386); income statement of Society (R. 386) (Appendix D, *infra*, p. 102), balance sheet of Society (R. 386) (Appendix D, *infra*, p. 95); the capital stock structure of the lessee by par value, voting power, number of shares issued and outstanding (R. 394-396); and prices paid therefor (R. 394); the names and addresses of the lessee's incorporators, directors and officers (R. 394-395); the number and class of shares and percentage of issued stock owned or controlled by each stockholder in lessee (R. 395); the beneficial ownership of such stock (R. 395); and a balance sheet of the lessee corporation (R. 406); (Appendix E, *infra*, p. 104).

In addition to the income statement of Society thus filed with the application (R. 386) (Appendix D, *infra*, p. 102), it had, of course, been required to submit annually before March 1, of each year a balance sheet and income statement.[3]

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[2] Rules and Regulations, Federal Communications Commission, Sec. 1.364.

[3] *Ibid.*, Sec. 1.361.

In addition to this financial data, the application, in accordance with the Commission's Rules and Regulations, contained further information with regard to the assignee's interests in, or connection with any other radio station or any business enterprise not disclosed on the assignee's balance sheet (R. 403), a detailed analysis of the proposed service to be provided by assignee, including the number of hours to be devoted to various types of programs (R. 404), copies of typical daily programs, showing the character of service proposed to be rendered, that assignee expected to obtain programs from the NBC chain, that 52% of total time proposed to be used would be for chain programs, and 20% for mechanical reproduction (R. 404), etc.

On November 23, 1942, while the above application was pending before the Commission, respondent instituted this action (R. 1) *and alleged in his petition the pendency of said application before the Commission* (R. 6).

On December 15, 1942, the Commission, after consideration of the application, supporting documents and evidence, granted its consent in writing to the assignment. Under its terms

> "The consent of the Federal Communications Commission is hereby granted to the assignment of station license No. B4-S-686, dated 11-6-42 authorizing operation of the transmitting apparatus located at No. 56 and Kansas Avenue, Omaha, Nebraska, from Woodmen of the World Life Insurance Society to Radio Station WOW, Inc. under authority of the Communications Act of 1934" (Ex. 32, R. 660-661, 662A).

The order of the Commission provided further that

> "The Commission's consent to said assignment is based on the representations made by the assignor and/or assignee that the statements contained in, or made in connection with, the application are true and that the undertakings of the parties upon which this assignment is authorized will be carried out in good faith . . ." (R. 662A).

On January 5, 1943, the Society and Radio Station WOW, Inc. filed a joint application with the Commission with copies of all pleadings in this action as of that date, and prayed that the Commission enter an order extending the time within which their contract might be consummated and postponing the effective date of the previous order of December 15, 1942, until final adjudication of this action (Ex. 33, R. 664-666, 667).

Thereafter, on January 12, 1943, the Commission entered an order denying this joint application (Ex. 34, R. 663, 664). This made effective the assignment and lease between the parties (Ex. 1, R. 21, 23, Ex. 13, R. 163-164), and the station was transferred accordingly.

Respondent did not at any time take any steps to intervene or set up his claims in any proceedings had before the Commission, although he alleged in his petition the pendency of the proceedings and the insufficiency of the showing made before the Commission (R. 5-6).

The pleadings in which the federal questions were raised in the trial court are discussed in detail in Part II (A) of the Argument (*infra*, pp. 20-23).

Decision of the Trial Court

At the conclusion of the trial the trial court, on March 9, 1943, announced its opinion from the bench as follows:

> "In the first place, I do not think there is any fraud here: there isn't any evidence of any fraud.
>
> "I don't think that the charges made with reference to the public service company have been substantiated; there has not been any evidence at all on that.
>
> "Now, taking into account those facts, I do not believe I would be justified in entering a decree setting aside this lease. And if you will, prepare a decree along that line" (R. 730).

Thereafter, the trial court entered its final decree on March 15, 1943, in which it made specific findings on the

factual issues in favor of petitioners and ordered the action dismissed with costs (R. 735-737).

First Opinion of the Supreme Court of Nebraska

In its first opinion filed March 10, 1944, the Supreme Court of Nebraska found unanimously that there was *no actual fraud* by the officers and directors of the Society, and *that no officer or director would gain directly or indirectly* by the assignment of the license and by the lease of the station facilities (R. 745, 754-755). Four justices, however, with three dissenting, held that the assignment of the license and the lease of the station facilities should be set aside because of certain features of the transactions which the court termed "legal or constructive fraud" (R. 755).

The purported grounds of the decision are discussed *infra*, pp. 44-60.

First Judgment of the Supreme Court of Nebraska

On the same date, March 10, 1944, the Supreme Court of Nebraska reversed the lower court and directed:

> ". . . The lease to the station, the lease to the space occupied by the station and the transfer of the license to operate the station be vacated and set aside. . . ."

and

> ". . . That the license to operate the station be returned and that lessee be directed to do all things necessary for that purpose; that generally everything be done to restore the parties to their original position prior to entering into the lease . . ." (R. 745).

Raising of the Federal Questions in the Supreme Court of Nebraska by Petitioners

When the jurisdiction of the Commission was invaded by the judgment of March 10, 1944, the petitioners filed in the Supreme Court of Nebraska on March 30, 1944, motions

to dismiss the action challenging the State court's jurisdiction and asserting exclusive jurisdiction of the Commission and the Federal courts (R. 775-776, 782).

These motions were overruled on May 26, 1944 (R. 793).

The petitioners also filed on March 30, 1944, motions for rehearing in the Supreme Court of Nebraska, reasserting that exclusive jurisdiction was vested in the Federal courts and Federal Communications Commission (R. 769, 778). On May 26, 1944, these motions were overruled, rehearing denied, and judgment and opinion of March 10, 1944, adhered to (R. 794).

The Second Opinion and Judgment of the Supreme Court of Nebraska

In its opinion on rehearing, on May 26, 1944, the court conceded that the power "to license a radio station, or to transfer, assign or annul such a license, is within the exclusive jurisdiction of the Federal Communications Commission" (R. 797). The court insisted, however, that such jurisdiction "does not deprive the state courts of jurisdiction to hear and decide all other property rights in a radio station and the rights of parties incident thereto," that "The effect of our former opinion was to vacate the lease of the radio station and to order a return of the property to its former status, the question of the federal license being a question solely for the Federal Communications Commission" (R. 797) and "The fact that the property involved was used in a licensed business was an incident to the suit only" (R. 798).

Despite this language the court adhered to its former judgment (R. 794).

The effect of the Court's decree is discussed *infra*, pp. 60-65.

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Nebraska erred:

1. In holding that the issue of its jurisdiction over the subject matter of the suit was eliminated from the case by the pleadings filed by the petitioner Society.

2. In cancelling the lease of the radio station without the consent of the Federal Communications Commission first having been given to a reassignment of the license to operate the facilities covered by such lease.

3. In nullifying, through such cancellation of the radio station lease, the order of the Federal Communications Commission which licensed the lessee alone to operate such station in the public interest.

4. In construing the jurisdiction of the Federal Communications Commission under Sections 309(b)(2) and 310(b) as applying only to transfers of licenses rather than as also including authority over transfers of the instrumentalities, facilities, apparatus, and services covered by the license.

5. In its opinion of May 26, 1944 (R. 794), by holding: "The fact that the property involved was used in a licensed business was an incident to the suit only" (R. 798).

6. In adjudicating, under the guise of a finding of constructive fraud, such issues as adequacy of consideration and financial responsibility of the lessee, the determination of which is vested in the Federal Communications Commission.

7. In failing to recognize the primary jurisdiction of the Federal Communications Commission to determine the validity of the transactions involved from the standpoint of the interest of the listening public in the larger and more effective use of radio.

8. In failing, because of the foregoing, to dismiss the suit.

9. In attempting to coerce Radio Station WOW, Inc. to return the license to the Society by directing it "to do all things necessary for that purpose" (R. 745), thereby seeking to accomplish indirectly that which said court conceded it did not have jurisdiction to order directly.

10. In invading the jurisdiction of the courts of the United States vested in said courts under the provisions of the Federal Communications Act, particularly Section 402(a).

11. In depriving petitioners, through the foregoing, of the rights, privileges and immunities vested in them under the Communications Act of 1934, as well as of property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT

I

THE JUDGMENT OF THE NEBRASKA COURT WAS FINAL

The direction for an accounting is merely ancillary to the rescission of the lease which is the essence of the decree. Such rescission being effective immediately, the retention of jurisdiction pending completion of the ancillary accounting did not affect the finality of the judgment. *Forgay* v. *Conrad*, 6 How. 201; *Thompson* v. *Dean*, 7 Wall. 342; *Winthrop Iron Co* v. *Meeker*, 109 U.S. 180; *Carondelet Canal & Nav. Co.* v. *Louisiana*, 233 U.S. 362; *Gulf Refining Co.* v. *United States*, 269 U.S. 125.

II

THE FEDERAL QUESTIONS WERE PROPERLY PRESENTED IN THE RECORD

Under the principle of clear intendment, the questions were adequately raised even in the trial court by the motion to strike and answer of Radio Station WOW, Inc. and Cillin, and the answer of the Society and its officers. *St. Louis, Iron Mountain & Southern Ry.* v. *Starbird*, 243 U.S. 592; *Green Bay & Mississippi Canal Co.* v. *Patton Paper Co.*, 172 U.S. 58. The statement of the Nebraska court that the federal questions were "eliminated from the case by the pleadings" is not supported by the record and is not controlling on this Court. *Boyd* v. *Nebraska ex rel. Thayer*, 143 U.S. 135; *First Natl. Bank* v. *Anderson*, 269 U.S. 341; *Davis* v. *Wechsler*, 263 U.S. 22.

Further, the questions could not be waived since they involved lack of jurisdiction over the subject matter. *Cf. United States* v. *Griffin*, 303 U.S. 226; *United States* v.

Corrick, 298 U.S. 435; *Green* v. *Obergfell*, 121 F.(2d) 46 (App.D.C. 1941); *Utah Fuel Co.* v. *National Bituminous Coal Comm.*, 101 F.(2d) 426 (App.D.C. 1938).

In any event, since the Nebraska Supreme Court considered and decided the federal questions, it is immaterial how they were raised in the trial court. *Fleming* v. *Fleming*, 264 U.S. 29; *Cissna* v. *Tennessee*, 246 U.S. 289; *Home Ins. Co.* v. *Dick*, 281 U.S. 397; *McKay* v. *Kalyton*, 204 U.S. 458; *Mallet* v. *North Carolina*, 181 U.S. 589; *Nickey* v. *Mississippi*, 292 U.S. 393; *Cumberland Coal Co.* v. *Board of Revision*, 284 U.S. 23.

III

THE JUDGMENT INVADES THE JURISDICTION OF THE FEDERAL COMMUNICATIONS COMMISSION WITH RESPECT TO THE TRANSFER AND OPERATION OF RADIO STATION WOW

Broadcasting is heavily charged with a vital public interest. Its very nature makes federal control not only appropriate but essential, and its cultural, social and political significance subject it, in some respects, to greater obligations in the public interest than public utilities. This is evident from the language as well as the legislative history of the Communications Act. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134; *National Broadcasting Co.* v. *United States*, 319 U.S. 190. To protect the congressional scheme for regulating broadcasting in the public interest, the jurisdiction of the Commission to issue licenses, approve transfers and otherwise determine matters in the public interest must be jealously safeguarded against invasion by other tribunals, whatever the ground relied upon. *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4; *Black River Valley Broadcasts, Inc.* v. *McNinch*, 101 F.(2d) 235 (App.D.C. 1938). This Court, of course, is not precluded by the language of the Nebraska court, but will review the record to determine whether the announced grounds in denying a federal right are of substance. *United States* v. *Pink*, 315 U.S. 203.

Although the decision is phrased in terms of "constructive fraud," an analysis of the petition (*infra*, pp. 40-43),

the evidence (*infra*, pp. 43-44), the opinion (*infra*, pp. 44-60) and the decree (*infra*, pp. 60-65) shows that it actually involved the decision of issues of public concern; and that the judgment, while purporting to deal only with the station "property" and not the "license," necessarily affected the one as fully as the other and nullified the license as well as the lease. The invasion of the Commission's jurisdiction, therefore, was direct and flagrant.

Every item relied on as contributing to the conclusion of "constructive fraud" was either exclusively, or predominantly, a public interest issue in which the Commission was directly concerned.

The judgment, therefore, because of the type of relief granted alone, prevents maintenance of this suit, whether on the ground that it sets aside and annuls the Commission's order, relief which can be granted only in a three-judge court under Section 402(a) of the act, or on the broader ground that congressional policy for the control of radio broadcasting cannot be thwarted by permitting courts to nullify administrative action taken in the public interest. *Venner* v. *Michigan Central R.R.*, 271 U.S. 127; *Lambert Run Coal Co.* v. *Baltimore & Ohio R.R.*, 258 U.S. 377; *Village of Mantorville* v. *Chicago, Great Western R.R.*, 8 F. Supp. 791 (D.Minn. 1934); *Hoard* v. *Chesapeake & Ohio Ry.*, 123 U.S. 222; *Beasley* v. *Texas & Pac. Ry.*, 191 U.S. 492; *New York* v. *New York Central R.R.*, 275 N.Y. 287, 9 N.E.(2d) 931 (1937). And whether or not the type of relief granted by itself precludes maintenance of the suit, the reliance by the court, as essential grounds for its judgment, upon decision of public interest questions, falling within the primary jurisdiction of an expert tribunal to determine, necessarily made this a suit nullifying the Commission's action which could not be maintained in a State court. *Armour & Co.* v. *Alton R.R.*, 312 U.S. 195; *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422; *Ford* v. *Oregon Electric Ry.*, 60 Ore. 278, 117 Pac. 809 (1911); *Corstvet* v. *Bank of Deerfield*, 220 Wis. 209, 263 N.W. 687 (1936); *Maroney* v. *Applegate*, 266 App. Div. 412, 42 N.Y.Supp.(2d) 768 (1943).

ARGUMENT

I

THE JUDGMENT OF THE SUPREME COURT OF NEBRASKA IS FINAL WITHIN THE MEANING OF SECTION 237(b) OF THE JUDICIAL CODE

Analyzed into its components, the judgment (R. 744, 745) contained seven directives:

(1) "... that the lease to the station, the lease to the space occupied by the station and the transfer of the license to operate the station be vacated and set aside;

(2) "that the $25,000 of accounts turned over by the society to lessee be returned;

(3) "that an accounting be had of the operation of the station by lessee since it took possession thereof on January 14, 1943, and that the income thereof less operating expenses be returned to the society;

(4) "that the license to operate the station be returned and that lessee be directed to do all things necessary for that purpose;

(5) "that generally everything be done to restore the parties to their original position prior to the entering into the lease;

(6) "that all expenses had by the society in connection with the transfer of the station and license to the lessee and the expense had in connection with returning the same to the society pursuant hereto are to be paid by the lessee;

(7) "... that all costs, both in this court and in the district court shall be paid by the defendants, except the Woodmen of the World Life Insurance Society."

None of these lacks finality. Even the third which orders an accounting is final under the decisions of this Court.

Forgay v. *Conrad*, 6 How. 201, would seem to be controlling. There the Circuit Court for the District of Louisiana, after hearing, had entered a decree setting aside as fraudulent a deed to certain lands and slaves. The court ordered the re-transfer of the lands and slaves to the complainant and ordered payment of certain monies by one of the defendants, concluding with a direction that the master (pp. 202-203) "take an account of the profits of the lands and slaves ordered to be delivered up, from the time of the filing of the bill until the property was delivered, or to the date of the master's report, and also an account of the money and notes received by one of the defendants." A motion was filed to dismiss the appeal from this decree on the ground that such decree was not final, within the meaning of the acts of Congress of 1789 and 1803. Chief Justice Taney, in overruling the motion, said (p. 204):

> "If these appellants, therefore, must wait until the accounts are reported by the master and confirmed by the court, they will be subjected to irreparable injury. For the lands and slaves which they claim will be taken out of their possession and sold, and the proceeds distributed among the creditors of the bankrupt, before they can have an opportunity of being heard in this court in defense of their reights. . . . And when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed."

This principle is applicable to the case at bar. If petitioners must wait until an accounting has been had of the income and disbursements of the station while operated by the lessee, they will, in Justice Taney's words, "be subjected to irreparable injury," since the station will already have been taken out of the lessee's possession before petitioners have had "an opportunity of being heard in this court in defense of their rights."

To the same effect are the decisions of this Court in *Thomson* v. *Dean*, 7 Wall. 342, 343 (where a decree to transfer certain shares of stock was held final, although the order directed "that account be taken and stated as to the amount paid and to be paid for the stock, and as to dividends accrued, and to be credited under the contracts between the parties"); and in *Winthrop Iron Co.* v. *Meeker*, 109 U.S. 180 (where a decree setting aside a lease was held final although it directed an accounting before a master by the lessee company and its directors for all profits from the use of the leased property during the period of the lease, with a further accounting ordered by the defendant directors concerning ores mined by them and the royalty of such ores owing to the company). To like effect are *Carondelet Canal & Nav. Co.* v. *Louisiana*, 233 U.S. 362; *Gulf Refining Co.* v. *United States*, 269 U.S. 125; *Knox Natl. Farm Loan Assn.* v. *Phillips*, 300 U.S. 194.

II

THE FEDERAL QUESTIONS WERE PROPERLY PRESENTED IN THE RECORD

We submit that the federal questions were properly presented for the following reasons: (a) the questions were adequately raised in the trial court under the principle of "clear intendment"; (b) in any event, the questions could not be waived since they involved jurisdiction over the subject matter; and (c) it is immaterial how the questions were raised in the trial court since the Supreme Court of Nebraska considered and decided them.

A. THE QUESTIONS WERE ADEQUATELY RAISED IN THE TRIAL COURT UNDER THE PRINCIPLE OF "CLEAR INTENDMENT"

Although it was not included in the record filed by respondent in the Supreme Court of Nebraska, the petitioners Radio Station WOW, Inc. and Gillin had filed a motion in the trial court for an order striking from the respondent's petition a part of paragraph 9 upon the ground:

> "... *that the granting or denying of an application to transfer or assign a radio station broadcasting license is a matter exclusively within the jurisdiction of the Federal Communications Commission*" (R. 785, 786).

This motion had been overruled by the trial court (R. 791). At the time of the filing in the Supreme Court of Nebraska of motions for rehearing and motions to dismiss for lack of jurisdiction, the petitioners also filed a motion for leave to file a supplemental transcript setting forth this motion and the order of the trial court overruling the same (R. 785-791), which was denied without explanation, on April 5, 1944 (R. 791). This was prior to the oral argument on rehearing April 8, 1944 (R. 784-792).

Radio Station WOW, Inc., and Gillin, after the overruling of their motion to strike, filed an answer in which in paragraph IX (c) it was alleged with respect to the federal question (R. 31):

> "Admit the material allegations contained in subparagraph (c) of Paragraph Nine (IX) of the petition except 'that said application is now pending before the Federal Communications Commission.' As to this defendants allege that pursuant to orders issued by the Federal Communications Commission on December 15, 1942, and January 12, 1943, said application was in all respects approved and the defendant Society and defendant Radio Station WOW, Inc., authorized and directed to effectuate said assignment; that pursuant to said authorization

and direction and in accordance therewith and with the terms of the lease hereinafter referred to, possession of the leased premises was delivered by the defendant Society to defendant Radio Station WOW, Inc., at 11:00 o'clock P. M. Eastern War Time, January 14, 1943, and since said time defendant Radio Station WOW, Inc. has had the exclusive right to the use of the call letters 'WOW' and broadcasting frequency of 590 Kilocycles, and said defendant is now and since said date has been in possession of and operating the broadcasting station under and by virtue of the lease hereinbefore referred to and orders of the Federal Communications Commission."

Likewise, in paragraph 18 of their answer the Society and its officers alleged (R. 21):

"18. Defendants further allege that the Federal Communications Commission by virtue of the laws of the United States of America and its rules and regulations made pursuant thereto, has and concedes that it has no jurisdiction, over the subject matter of plaintiff's action, *except* jurisdiction to determine the transfer of the license to operate said radio station, which jurisdiction after full and complete showing and notwithstanding objections filed thereto, was exercised in the approval of the transfer of said license to the defendant Radio Station WOW, Inc., and further order to the Society to execute and perform the provisions of said lease by virtue of which the possession of said lease property has now been delivered to the lessee, all as more particularly herein found".

We respectfully submit that these pleadings constitute a sufficient claim that the Commission had exclusive jurisdiction over the assignment of the license and over the transfer of the facilities; that pursuant to the orders of the Commission the license had been assigned and the lease had

become effective; that possession of the leased property had been delivered to Radio Station WOW, Inc., and that since January 14, 1943, the station had been operated by the lessee under the orders of the Commission. Thus, the claim of federal jurisdiction was definitely set forth.

No particular form of words is essential to set up a federal right or claim. It is only required that the federal questions be brought to the attention of the Court. Where it appears from a fair reading of the pleading that the federal claim is based upon a particular Federal statute or authority, whether adverted to in terms or not, this Court will judicially notice such statute and consider it pleaded and raised.

In *St. Louis, Iron Mountain & Southern Ry.* v. *Starbird*, 243 U.S. 592, 598, the Court said:

> "The federal right is not required to be pleaded in any special or particular form. . . . 'That it is not necessary, that the question should appear on the record to have been raised, and the decision made in direct and positive terms, *ipsissimis verbis*; but that it is sufficient, if it appears by clear and necessary intendment, that the question must have been raised, and must have been decided, in order to have induced the judgment.'"

In *Green Bay & Mississippi Canal Co.* v. *Patten Paper Co.*, 172 U.S. 58, 67-68, the Court said:

> "But no particular form of words or phrases has ever been declared necessary in which the claim of Federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state court in such manner as to bring it to the attention of that court."

Other decisions of this Court to the same effect are: *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67; *Furman* v. *Nichol*, 8 Wall. 44, 56; *Whitney* v. *California*, 274 U.S. 357, 360-361; *Powell* v. *Brunswick County*, 150 U.S. 433, 440.

That the statement of the Supreme Court of Nebraska that the federal question "was eliminated from the case by the pleadings" (R. 798) is not sustained by the pleadings. The language quoted by the court is lifted only from the answer of the Society and its officers. Such language nowhere appears in any pleading of WOW, Inc. and Gillin. Even as to the Society's answer, the opinion does not disclose that the statement the Commission had no jurisdiction was subject to the following exceptions:

> 1. ". . . jurisdiction to determine the transfer of the license to operate said radio station, which jurisdiction after full and complete showing and notwithstanding objections filed thereto, was exercised in the approval of the transfer of said license to Radio Station WOW, Inc. . . ."
>
> 2. the "further order to the Society to execute and perform the provisions of said lease," and
>
> 3. ". . . by virtue of which possession of said leased property has now been delivered to the lessee" (R. 21).

Of course, the statement of the Nebraska court that the federal question had been eliminated is not controlling, this being an issue ultimately for decision by this court. *Boyd* v. *Nebraska ex rel. Thayer*, 143 U.S. 135; *First Natl. Bank* v. *Anderson*, 269 U.S. 341; *Davis* v. *Wechsler*, 263 U.S. 22.

B. THE QUESTIONS COULD NOT BE WAIVED SINCE THEY INVOLVED JURISDICTION OVER THE SUBJECT MATTER

In its second opinion the Supreme Court of Nebraska states: "The answer of the defendants, heretofore quoted, squarely contradicts the position they now endeavor to assume" (R. 798).

This refers to paragraph 18 of the Society's answer which, as shown above, explicitly excepted "jurisdiction to determine the transfer of the license to operate said radio station, . . . and [the] further order to the Society to execute and perform the provisions of said lease" (R. 21) as being vested in the Commission.

In any event, jurisdiction of the subject matter could not be acquired by the State courts by consent, acquiescence, or inadvertence of the parties. The principle was well stated by the Court of Appeals of the District of Columbia in *Woodmen of the World Life Insurance Association* v. *Federal Communications Commission*, 99 F.(2d) 122 (App. D.C. 1938), involving Section 402(b) of the Communications Act, where the court said:

> "Jurisdiction cannot be given to a court by consent, acquiescence or inadvertence. It can acquire jurisdiction only by authority of law. It is immaterial, therefore, what the situation may be 'as a practical matter'" (*ibid.*, p. 123).

This principle is further illustrated in *United States* v. *Griffin*, 303 U.S. 226; *United States* v. *Corrick*, 298 U.S. 435; *Green* v. *Obergfell*, 121 F.(2d) 46 (App.D.C. 1941); *Utah Fuel Co.* v. *National Bituminous Coal Comm.*, 101 F.(2d) 426 (App.D.C. 1938).

It is significant that the Nebraska court itself, in its opinion on rehearing recognized that lack of jurisdiction could be raised at any time (R. 798-799). That this is the well-settled rule in Nebraska is clear under *In re Hansen's Estate*, 117 Neb. 551, 221 N.W. 694 (1928), in which the court held that "an objection to the jurisdiction over the subject matter may be raised at any stage of the proceedings. It may be raised for the first time on appeal" (*ibid.* at 551).

C. IT IS IMMATERIAL HOW THE QUESTIONS WERE RAISED IN THE TRIAL COURT SINCE THE SUPREME COURT OF NEBRASKA CONSIDERED AND DECIDED THE QUESTIONS

As set forth above, the federal questions were adequately raised in the trial court, within the clear intendment rule. In any event, what happened in the trial court is immaterial since all of the federal questions were explicitly raised in the Supreme Court of Nebraska by motions to dismiss and for rehearing, which motions were considered and decided on their merits.

The motion to dismiss of the Society, filed March 30, 1944, assigned the following reasons for dismissal:

> "1. The Court has no jurisdiction over the subject matter of this action.
>
> "2. This action involves the use of a channel of Radio transmission and a license therefor, and the control and jurisdiction of such is exclusively in the United States of America acting through and by the Federal Communications Commission by virtue of the provisions of Sub-Chapter I to Sub-Chapter VI inclusive of Chapter 5, Title 47 U. S. C. A.
>
> "3. Any person aggrieved, or whose interests are claimed to be adversely affected by any decision of the Federal Communications Commission, must proceed in accordance with the provisions of Sub-Chapter I to Sub-Chapter VI, inclusive, of Chapter 5, Title 47 U. S. C. A." (R. 775-776).

The motion for rehearing of the Society was filed March 30, 1944, and in it the federal questions were raised as follows (R. 769-771):

> "The order of the Court that '. . . the transfer of the license to operate the station be vacated and set aside . . .' (Maj. Op., p. 25),

and

> "'. . . that the license to operate the station be returned and that lessee is directed to do all things necessary for that purpose . . .'" (Maj. Op., p. 26),

is void and unenforceable for the following reasons:

> "1. Under the Act of Congress (47 U. S. C. A. Sub-Chapters I to VI inclusive of Chapter 5) creating the Federal Communications Commission and defining its jurisdiction and power, the issuance, assignment, transfer, surrender or revocation of all radio licenses is within the exclusive jurisdiction and power of the Federal Communications Commission.

"2. This Court has no jurisdiction or power to require or direct Radio Station WOW, Inc., to assign, surrender, cancel or transfer the radio license now held by it for the operation of Radio Station WOW, as jurisdiction over that subject matter is solely and exclusively within the jurisdiction and the power of the Federal Communications Commission.

"II

"This action is essentially one to annul or set aside an order of the Federal Communications Commission made under the provisions of Title 47, U. S. C. A., Subchapters I to VI inclusive of Chapter 5, and neither the District Court nor this Court ever acquired jurisdiction over the subject of this action.

"III

"This Court has no jurisdiction or power to decree that the lessee, Radio Station WOW, Inc., surrender or assign the radio license issued to it by the Federal Communications Commission, nor to require the Federal Communications Commission to consent to the assignment thereof to the Society, nor to require the Federal Communications Commission to issue a new radio license to the Society, nor to deprive the lessee of the continued use of its radio license.

"IV

"This Court being without jurisdiction or power to require the return of the radio license to the Society, the effect of the majority opinion of the Court is to revest the possession of the broadcasting equipment in the Society without a radio license to operate a radio station, leaving Radio Station WOW, Inc. with a radio license but without broadcasting equipment to enable it to operate a radio station.

"V

> "The judgment and opinion of this Court vacating and setting aside the transfer of the license to operate the Radio Station and ordering that the license to operate the Radio Station be returned to the Society and directing the lessee to do all things necessary for that purpose is void and unenforceable and contravenes and is repugnant to the Commerce clause of Section 8 of Article I of the Constitution of the United States and to Acts of the Congress of the United States, being the Communications Act of 1934 and amendments thereto, Subchapters I to VI, inclusive, of Chapter 5 of Title 47 of United States Code Annotated, in that exclusive jurisdiction over all the channels of interstate and foreign radio transmission and the use of such channels is vested in the United States, its Federal Communications Commission and its Courts."

The motions to dismiss and for rehearing were overruled May 26, 1944 (R. 793, 794).

Comparable motions filed by the petitioners WOW, Inc. and Gillin (R. 778, 782) in like manner were overruled May 26, 1944 (R. 793, 794).

In denying these motions, it is plain that the Nebraska Court considered and passed upon the federal questions. The opinion in the course of a lengthy discussion, concludes that

> ". . . the right of the Federal Communications Commission to license and to require compliance with the regulations of the commission does not deprive the state courts of jurisdiction to hear and decide all other property rights in a radio station and the rights of parties incident thereto" (R. 797);

that while "true that the Federal Communications Commission may refuse to approve the reissuance of a license" to the Society (R. 797), that "does not concern this court and

is not involved in the decision of the case now before us"; that the denial of such reissuance of a license to the Society would leave it "in no different position than if it was obliged to take the station back under the express terms of the lease" (R. 797), that "The claim that this was an action essentially to annul or set aside an order of the Federal Communications Commission is wholly without merit" and "The fact that the property involved was used in a licensed business was an incident to the suit only" (R. 798).

In view of the foregoing, the Supreme Court of Nebraska, although stating that petitioners' position "was eliminated from the case by the pleadings they filed" also decided that: "*Their position is unsound on its merits . . .*" (R. 798).

The case, therefore, comes within the principle that if a State Supreme court considers and passes upon federal questions, even though these are first raised on motion for rehearing before that court, the federal question is properly raised so as to give jurisdiction to this Court under Sec. 237(b) of the Judicial Code. *Home Ins. Co.* v. *Dick*, 281 U.S. 397; *Fleming* v. *Fleming*, 264 U.S. 29; *Cissna* v. *Tennessee*, 246 U.S. 289; *McKay* v. *Kalyton*, 204 U.S. 458; *Mallett* v. *North Carolina*, 181 U.S. 589. See also: *Nickey* v. *Mississippi*, 292 U.S. 393. The length of the discussion in the State court is immaterial, *Cumberland Coal Co.* v. *Board of Revision*, 284 U.S. 23. Nor is there any independent non-federal ground to sustain the judgment below. It is well settled that where a non-federal ground for a decision is so interwoven with the federal ground as not to be independent and of sufficient breadth to sustain a judgment without a decision of the other ground, the jurisdiction of this Court is plain. *Enterprise Irrig. Dist.* v. *Farmers Mutual Canal Co.*, 243 U.S. 157; *State Tax Comm.* v. *Van Cott*, 306 U.S. 511; *Abie State Bank* v. *Bryan*, 282 U.S. 765; *Atlantic Coast Line* v. *Wharton*, 207 U.S. 328; *Chicago, Burlington, & Quincy Ry.* v. *Drainage Commrs.* 200 U.S. 561. *A fortiori*, here, where the judgment below itself invades the jurisdiction of the Commission, and where the decision of public interest questions within the jurisdiction of the Commission

to determine is an essential basis for that judgment, the jurisdiction of this Court is clear.

The court's statement that the issues were waived or untimely is of no consequence, if the court nevertheless *proceeds to pass on the merits.* Thus, in *Fleming* v. *Fleming, supra,* an application was filed in the Supreme Court of Iowa, 194 Ia. 71, 174 N.W. 946 (1922), for a second rehearing on the ground that the court's decision, by reversing prior rulings on the basis of which the parties had contracted, had brought about an unconstitutional impairment of contract. The Iowa Supreme Court, after stating that "such plea of unconstitutionality, . . . is negatived by the opinion complained of," added that "if the premise were conceded, such point would have been just as available to the appellants in their original argument as in their petition for rehearing," but that "No such point was therein made" (*ibid.* at 124). The Iowa court then concluded that it could not "recognize the point now made, as presenting a Federal question" notwithstanding the court's desire "as a matter of sincere deference to the higher court, or as a matter of courtesy to the distinguished counsel" to make such determination "as would enable a review of our decision by the higher court" (*ibid.* at 124). Notwithstanding this language, the United States Supreme Court held, when the case came before it (264 U.S. at 31), that there was "a sufficient consideration of the point by the State Supreme Court before its judgment, to justify an assignment of error raising the federal question, if in fact and in law it be one."

III

THE JUDGMENT BELOW INVADES THE JURISDICTION OF THE FEDERAL COMMUNICATIONS COMMISSION BY NULLIFYING ITS PRIOR ORDER AUTHORIZING OPERATION OF STATION WOW BY PETITIONER WOW, INC. IN THE PUBLIC INTEREST AND BY DECIDING ADMINISTRATIVE QUESTIONS WITH RESPECT TO THE TRANSFER AND OPERATION OF RADIO STATION WOW

A. BROADCASTING IS HEAVILY CHARGED WITH A VITAL PUBLIC INTEREST, AND CONGRESS ENDOWED THE FEDERAL COMMUNICATIONS COMMISSION WITH PLENARY AUTHORITY TO PROTECT, PROMOTE AND TO DECIDE ALL QUESTIONS AFFECTING THE PUBLIC INTEREST

The physical characteristics of radio propagation make broadcasting a matter of great national concern. "By its very nature, broadcasting transcends State lines and is national in its scope and importance. . . ." *Fisher's Blend Station, Inc.* v. *State Tax Comm.*, 297 U.S. 650, 655. As a result, federal legislation is "not only appropriate but essential to the efficient use of radio facilities." *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279.

Equally clear is the tremendous cultural, social and political significance of broadcasting. This Court, we believe, is fully cognizant of the peculiarly vital public interest character which broadcasting has—a character far transcending in its importance the traditional idea of "public interest" as applied in other fields.

The concept is largely derived from the field of public utilities where the feature of monopoly carries with it certain corollaries with respect to public regulation of rate of return, adequacy of service, etc. In the case of broadcasting, however, even though it involves an element of semi-monopolistic privilege, the significance to the public stems from different sources and rests on different reasons. In broadcasting, more than comfort and convenience is involved: it is concerned with the realm of ideas and freedom of speech. Its strongly distinctive facts invite special consideration of the public interest involved. For the vital character of radio broadcasting has become such that at no

other point on the compass of public interest is the needle so attracted in terms of actual significance to the public.

From hour to hour, radio broadcasting projects itself into the living rooms of most of our families and into the many other places where people meet. Programs are continuous through most, or all, of the twenty-four hours. Entertainment occupies a large portion of the time, and, to a great extent, the cultural level of the people is affected by the general quality of the broadcast material. Much of the people's time is devoted to broadcasts and their habits are affected accordingly. It is no exaggeration to suggest that character and way of life are heavily influenced. These facts alone make apparent the grave responsibility of the radio station licensee intelligently to appraise and to meet the needs of the community he serves.

In a still broader field, significant public issues may be determined by the people through radio broadcasting. To a real degree candidates are elected or defeated through the influence of radio. To an ever increasing degree, men powerful and good, and men powerful and dangerous have risen to positions of great influence over the people through the use of radio. So sensitive is this public mechanism that misuse of the public facility may result in grave injury to the public.

On no facet is broadcasting more significant than in its service as a mechanism of national free speech. News from all corners of the globe moves almost unceasingly and instanstaneously to the people. Radio news comment occupies a position of outstanding public importance. Over the radio important public issues are debated by partisans. The forum method of discussion moves on apace. Public appraisals of facts, of issues, and of men follow closely the presentations through the medium of broadcasting.

Free speech itself has come to have a different factual quality since the days of Thomas Paine. No longer can a substantial public opinion be influenced by a speech in the town hall. And the cost of publication of pamphlets for widespread distribution has moved beyond the reach of the individual. Twenty-five years ago free speech lacked the

practical means for being realized. Today, we have the powerful force of radio as a mechanism of national free speech. By network, a single voice moves through WEAF at New York, WMAQ at Chicago, WOW at Omaha, KOA at Denver and KPO at San Francisco, and more than one hundred other stations, to reach a nation-wide audience. For the first time in more than a century, if not in history, an individual may influence national public opinion through the sound of his voice.

Little wonder that through the work of the industry itself, and the public agency charged with its regulation, basic principles have come to be enunciated. Laying aside policies having to do with the quality and character of entertainment, we find clearly established the principle of radio as a public trust. Free speech as the right of the speaker has been appraised in the light of the obligation placed upon licensees to preserve and to operate this national public mechanism in the interest of the *listeners as a whole*, thus tending to accomplish the greatest single function of free speech itself. It has become an instrument of our democracy. News is presented fully and fairly. Comment, however incisive, tends to reflect the considerations on both sides of public issues. Forums and debates are devoted to the accomplishment of this principle. The use of the mechanism to serve private or limited purposes of the broadcaster is disapproved. Radio stations have no editors-in-chief and no editorial policy of their own. Thus we find that both the industry[4] and the regulatory body[5] have recognized the sensitive and vital character of broadcasting in its relation

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[4] The Code of the industry association, The National Association of Broadcasters, provides:

"As part of their public service, networks and stations shall provide time for the presentation of public questions including those of controversial nature. Such time shall be allotted with due regard to all the other elements of balanced program schedules and to the degree of public interest in the questions to be presented. Broadcasters shall use their best efforts to allot such time with fairness to all elements in a given controversy" (*Radio Annual*, 1944 (Radio Daily), p. 904).

[5] See *In the Matter of the Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1940), quoted in part, *infra*, p. 46, note 10.

to the public as a whole. Here, then, we strike a great contrast between public interest in those things which are public utilities—which radio is not—and the public interest in radio broadcasting which strikes so closely to the heart and to the minds and to the lives of a free people.

It is plain that the public interest in such a significant social instrument must be both protected and promoted: It was with that purpose in view that Congress assumed control over radio.

The very thing which directly gave rise to comprehensive congressional control early in the development of radio was the earlier subordination of the interests of the public to private advantage. When, as the President in his message to Congress of December 7, 1926, said, ". . . the whole service of this most important public function has drifted into such chaos as seems likely, if not remedied, to destroy its great value" (H.Doc. 483, 69th Cong., 2d Sess., p. 10), Congress promptly supplied the remedy. By the Federal Radio Act of 1927 (44 Stat. 1162) and the Communications Act of 1934 (50 Stat. 189, 47 U.S.C. sec. 151), "Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry." *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137. The substantive ends to be served by this legislation are expressly stated. Section 1 of the Communications Act declares the congressional purpose: ". . . to make available, so far as possible, to all the people of the United States . . . [an] . . . efficient, Nationwide . . . radio communication service with adequate facilities. . . ." Again, specifically as to radio, Section 301 of the act provides:

> "It is the purpose of this Act . . . to maintain the control of the United States over all the channels of interstate . . . radio transmission; and to provide for the use of such channels . . . by persons . . . under licenses granted by Federal authority. . . ."

Thus, the objective of Congress was "to protect the public interest," the "national interest" in radio broadcasting. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137; *Scripps-Howard Radio Inc.* v. *Federal Communications Commission*, 316 U.S. 4, 6. As stated by the Court in *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 217: "The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States."

In order to carry this policy into execution Congress established the Federal Communications Commission. Recognizing "the great need for the creation of one central body vested with comprehensive jurisdiction over the industry" and in accordance with "the primary purpose of this bill to create such a commission armed with adequate statutory powers to regulate all forms of communication" (H.Rept. 1850, 73d Cong., 2d Sess., p. 1), Congress endowed the Commission with "comprehensive powers to promote and realize the vast potentialities of radio". *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 217. It was given the job of determining "under statutory direction the rights of the people of the United States to have the best possible radio service." *Black River Valley Broadcasts, Inc.* v. *McNinch*, 101 F.(2d) 235, 237 (App.D.C. 1938).

This, the Communications Act, among other things, contained the broad and unique direction that "as public convenience, interest or necessity requires," the Commission "shall . . . generally encourage the larger and more effective use of radio in the public interest" (Section 303(g)). Moreover, "The Commission may perform any and all acts, make such rules and regulations, and, issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions" and "may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice" (Sections 4(i), (j)).

In order that these general powers may be effectuated, they are implemented by the comprehensive licensing

authority granted to the Commission. The Commission is given plenary powers with respect to broadcasting: to grant or deny construction permits, licenses, renewal licenses and modifications of licenses; to revoke licenses and to authorize or deny assignment of licenses or transfers of control over a licensee, and in that connection to pass upon "the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station", etc. (Sections 307-312, 319(a)). The standard prescribed throughout by the Congress for the exercise by the Commission of those powers (for example, in granting a license or authorizing an assignment of license) is "public interest, convenience or necessity"—the "public interest" thus required to be served being "the interest of the listening public in 'the larger and more effective use of radio,'" *National Broadcasting Company* v. *United States*, 319 U.S. 190, 216. Under Section 310(b), an assignment or other disposition of "the station license," "the frequencies authorized to be used," and "the rights therein granted" (even by transfer of control of a corporation holding a license), is permissible only if "the Commission shall, *after securing full information, decide that said transfer is in the public interest*, and shall give its consent in writing."

Thus, the authority conferred upon the Commission is not merely a negative and restrictive control, but, rather, is the grant of affirmative and expansive powers and obligations to set up a broadcasting system through licensees of its own choice to insure continuity of public service and to obtain the best service possible.

To protect the integrity of this congressional scheme for the regulation of broadcasting, the jurisdiction of the Commission to issue licenses, approve transfers of radio stations and otherwise determine matters in the public interest must be jealously safeguarded. "Of course, no court can grant an application or authorization which the Commission has refused." *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4, 14. And no other tribunal should be permitted, wittingly or

unwittingly, whatever the ground relied upon, to supplant the Commission in the highly complex and comprehensive business of determining the public interest questions involved in granting, denying, or nullifying such authorizations. To countenance any such encroachment would thwart the basic congressional purpose of centralized control by a single expert body to assure the listening public the maximum of broadcasting service. The considerations are well summarized by the Court of Appeals of the District of Columbia in *Black River Valley Broadcasts, Inc.* v. *McNinch*, 101 F.(2d) 235, 237 (App.D.C. 1938):

> "The Commission is an administrative agency set up by Congress to determine under statutory direction the rights of the people of the United States *to have the best possible radio service.* The interest, convenience, and necessity of the public is an essential test for the privilege of operating a radio station. This determination is, by the Act of 1934, lodged in the Commission. *It is the only proper agency* to decide these public questions. . . ."

The court below, as we shall show, made just such an invasion of the Commission's jurisdiction both in the grounds for its decision and in the relief it granted. As a basis for vacating the lease of the licensed facilities and for its conclusion that it was not affecting the license in any way (which, as we shall show, was entirely erroneous), the court relied upon a separation between "license" and "property", saying that "The fact that the property involved was used in a licensed business was an incident to the suit only" (R. 798). It argued further that the conceded right of the Commission to license and require compliance with its regulations "does not deprive the state courts of jurisdiction to hear and decide all *other property rights* in a radio station and the rights of parties incident thereto" (R. 797). Any such separation of such a complex congeries of rights, privileges, and responsibilities as is involved in a "radio station" is obviously artificial and

completely ignores both the legal and practical connections involved.

The facilities used in broadcasting are as integral a part of the licensed operation as the frequency itself. They are part and parcel of a single instrumentality devoted to rendering a service "in the public interest," and its disposition and control are necessarily affected by the use to which they are put. It is a well-settled principle at common-law that property devoted to a public service will not be separated from the franchise it is necessary to effectuate, and rights asserted against that property are subordinated to that principle in order to protect the public interest. *Gue v. Tide Water Canal Co.*, 24 How. 257, 263; *East Alabama Ry. v. Doe ex dem. Visscher*, 114 U.S. 340, 351; *Ackroyd v. Winston Bros. Co.*, 113 F.(2d) 657, 659-660 (C.C.A. 9th, 1940); *Louisville, N.A.& C.Ry. v. Boney*, 117 Ind. 501, 505-509, 20 N.E. 432 (1889); *Brady v. Johnson*, 75 Md. 445, 449, 26 Atl. 49, (1892); *Northern Pac. R.R. v. Shimwell*, 6 Mont. 161, 9 Pac. 889 (1886); *Overton Bridge Co. v. Means*, 33 Neb. 857, 859-860, 51 N.W. 240 (1892); *Sherman County Irrig., W.P.& I. Co. v. Drake*, 65 Neb. 699, 700, 91 N.W. 512 (1920); *Foster and Co. v. Fowler and Co.*, 60 Pa. St. 27, 30-31 (1868).

The Communications Act itself, moreover, makes clear that the simple separation relied on by the court below is unsound. A license is not merely a negative means of controlling radio operations but, as we have seen, an affirmative means for carrying out the basic congressional purpose of providing an "efficient, Nation-wide . . . radio communication service with adequate facilities" (Section 1) and "the maximum benefits of radio to all the people of the United States" *National Broadcasting Co. v. United States*, 319 U.S. 190, 217. "'Radio communication' . . . means the transmission by radio of . . . signals . . . and sounds of all kinds . . . including all instrumentalities, facilities, apparatus . . . incidental to such transmission" (Section 3(b)). It is the licensing of a "radio station" and a "station license" which the act provides for throughout (*e.g.*, Sections 2(a), 303-305, 307, 309-312, 318, 326). And a "'radio station'

. . . means a station equipped to engage in radio communications" (Section 3(k)). It is a specific radio station with its physical equipment which is licensed, and to which the Commission assigns a frequency. So intimate is the connection between license and property, that the Commission's jurisdiction attaches prior to the construction of a station. And the Commission may deny or grant a permit to construct a station as public interest, convenience or necessity may dictate (Section 319(a)). The physical design of the station is laid out in vast detail in the application for construction permit—it is this detailed pattern which is subsequently licensed—both in the original construction and subsequent operation of the station, the Commission exercises broad and detailed authority over the physical properties: the location of the station, the equipment, the antenna systems, etc., so that changes, for example, in tubes or in actual or relative location or height of any of the antenna towers all require Commission authorization.[6]

In the case of transfers of licenses and "the rights granted therein," the association of the physical property with the license and the jurisdiction of the Commission over the one as over the other are emphasized by the grant of authority over a disposition of license "indirectly by transfer or control of any corporation holding such license" (Section 310(b)).

So integral a part of the license are the facilities in Congressional contemplation that Section 319(a) requires that the application for a construction permit specifically set forth when "the station is expected to be completed and in operation." And Section 319(b) provides that a permit, when granted,

> ". . . shall show specifically the earliest and latest dates between which the actual operation of such

[6] Rules and Regulations, Secs. 3.44-3.64; Standards of Good Engineering Practice, pp. 36-76.

The close association of the property devoted to broadcasting and the authorization therefor is shown by the license presently outstanding for Station WOW, set forth in Appendix C, *infra*, p. 89. See also the Commission's Consent to Assignment of License of Radio Station WOW in this case (Ex. 32, R. 661, 662A).

> station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified. . . ."

In recognition of the fact that the physical facilities are the necessary complement of the right to use the frequency in a licensed operation, the Commission has consistently refused to permit a licensee to cease operations except for a few days because of an emergency (Rules and Regulations, Section 3.71). Indeed, to recognize the validity of a license separated from the facilities licensed would violate the Congressional purpose of providing for the "use" but not the "ownership" of radio frequencies (Section 301). The separation of a license from the facilities necessary to its exercise is an anomaly, foreign to both congressional intent and administrative practice.

With the facilities used in broadcasting being such a necessary and integral part of the license, the permissible scope of State court action in dealing with a "radio station" cannot rest upon any such false dichotomy as that drawn by the court below between the "license" and the "property" used to effectuate it. The fact is, of course, that there is a single instrumentality, dealing with any part of which necessarily affects the others. The line delimiting the sphere within which the State court may act must, rather, be drawn on the basis of the character of the questions it purports to decide and the effect of its judgment upon the jurisdiction and orders of the Commission. For example, it would seem plain that a State court can not, on the ground that it is dealing with physical property or determining property rights, determine that the Commission's regulations as to equipment or antenna systems mentioned above (p. 38) are improper, or set aside a lease of a station because it deemed inadequate the engineering of the licensee which was in conformance with Commission regulations. No more, we submit, may a State court, under the guise of dealing with property and deciding property rights, nullify a license or that a licensee intends to

abuse his license by propagandizing for his private advantage, is not financially qualified or fails to meet any other essentially public interest criterion within the jurisdiction of the Commission to decide. That the court below decided just such public interest questions will, we believe, appear from an analysis of its opinion and decree.

It is, of course, well settled that where a federal right is involved, this Court will not accept the language or conclusions of the State court upon points upon which the federal right may rest, but itself "will review or independently determine all questions on which a federal right is necessarily dependent" (*United States* v. *Pink*, 315 U.S. 203, 217); and that this Court will "inquire not only whether the right was denied in direct terms, but also whether it was denied in substance and effect by interposing a nonfederal ground of decision *having no fair support*" (*Ancient Egyptian Order* v. *Michaux*, 279 U.S. 737, 745).

B. THE JUDGMENT AND DECREE OF THE COURT BELOW (1) INVOLVE THE DECISION OF ESSENTIALLY PUBLIC INTEREST QUESTIONS AFFECTING BROADCASTING WITHIN THE JURISDICTION OF THE COMMISSION TO DETERMINE AND (2) NULLIFY ACTION OF THE COMMISSION BASED IN ITS DETERMINATION OF THOSE QUESTIONS

That the case itself, as presented in the trial court and as decided by the Supreme Court of Nebraska, involves predominantly vital public interest considerations within the jurisdiction and the peculiar competence of the Commission will be apparent, we believe, on analysis of the petition, the issues as developed in the course of trial, the decision of the majority of the Supreme Court of Nebraska, and the decree.

1. The Petition

The petition (summarized *supra*, pp. 5-8) explicitly sought simply the nullification of the transfer approved by the Commission and of the radio station license issued to the lessee (R. 10). The petition itself refers to the pendency of the proceedings before the Commission and attacks as insufficient the showing made by petitioners in the Commission proceedings (R. 5-6). Respondent, avoid-

ing an appearance or any step toward intervention before the Commission, nevertheless, alleges that the Mayor of Omaha had filed objections with the Commission, calling for a public hearing on the license transfer "for the reason that it is contrary to the public interest of the citizens of Omaha, Nebraska" (R. 6). A large portion of the petition is then devoted to allegations as to the threatened misuse of the station and the station license as a propaganda mechanism in the interests of those advocating public ownership and operation of electric power facilities (R. 7-8). All of this, it is alleged, is "contrary . . . to the best interests . . . [of] the listeners of the station and . . . the public generally" (R. 9).

The petition likewise complains of the insistence of the Society that the concededly competent management of Gillin be continued by the lessee corporation (R. 8). In this respect also, the petition strikes at the heart of a consideration not only of interest to both parties to the transaction but also of great significance to the Commission. That body must consider the competency of management and its probable effect on the quality of the service to the public projected in the transfer which it was called upon to approve.[7]

The petition does not contain the word "fraud." Its claim is that the consideration to be paid was inadequate (R. 6). Strangely enough, it also alleges that the lessee receiving these valuable and profitable facilities and operations at an inadequate cost would, nevertheless, prove to be financially unstable and hence lacking in the prospect of continued successful operations and, in turn, of securing performance of the obligations owed to the Society (R. 6-7). Here again, the petition projects itself into a problem of public interest with which the Commission is vitally concerned; namely, the financial basis of a broadcasting operation as an assurance of its soundness and ability to meet obligations and of the continuity and character of the public service to be rendered under the license.[8]

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[7] See Commission decisions, cited *infra*, p. 49, note 11.

[8] See Commission decisions, cited *infra*, p. 50, note 13.

As pointed out below (pp. 52-60), the problem of appraising the value of a broadcast station is one necessarily founded upon factors within the peculiar competence of the regulatory body. In this same problem there is also involved the question whether extraordinary profits can be capitalized by normal promotional methods without necessarily attributing a great portion of those profits to the element of monopoly inherent in the public grant of a radio frequency, and without running head-on into the statutory prohibition against recognizing any private property interest in this public grant.

Nor can the petition be reconciled with the strong public interest, frequently recognized by the Commission, in preferring responsible and competent local, personal management to management by a large financial institution with a predominant degree of absentee ownership and direction, and in which the broadcast operations constitute a subordinate part of its interests (R. 289, 316-317).[9]

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[9] See Commission decisions, cited *infra*, p. 49, note 11; p. 50, note 13.

In designating for consolidated hearings applications for transfer of control of a licensee to a bank, as trustee, and for renewal of license, the Commission specified the following issues:

"To determine whether public interest would be served by the transfer of control of Station KFMB to a bank or trust company which has no beneficial interest in the station and whose regular business is devoted to banking and to the administration of various and numerous trusts, estates, accounts, and agencies.

"To determine the manner in which Station KFMB would be operated, particularly with respect to management and service, if the application for transfer of control were approved.

"To determine whether approval of the transfer of control of Station KFMB to the First National Trust and Savings Bank of San Diego, trustee, under the terms and conditions proposed in the application would be consistent with the provisions of the Communications Act of 1934 and in the public interest.

"To determine whether public interest, convenience, and necessity would be served by the granting of renewal license for operation of Station KFMB under the control of a bank or trust company which has no beneficial interest in the station and whose regular business is devoted to banking and to the administration of various and numerous trusts, estates, accounts, and agencies." Notices of April 15, 1943 in

Finally, it should be noted that the petition at no point discloses why respondent took no steps to present these public considerations to the regulatory body having both the responsibility and the peculiar competence to consider them.

2. The Trial

The respondent, plaintiff below, did not appear in the course of the trial. All of the testimony was presented through the officers and directors of petitioners and through a group of noted experts, *all of whom testified upon behalf of petitioners* (R. 542, 580, 612, 627, 636, 644). The trial itself cured none of the basic deficiencies in the petition, and produced nothing which could properly be deemed to redefine the case as one falling within the appropriate realm of private litigation in a local court of equity. The trial

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In re Application of the First National Trust & Savings Bank of San Diego, Docket No. 6500 (1943), and *In re Application of Worcester Broadcasting Corp. (KFMB)*, Docket No. 6501 (1943).

Transfer of control to the Bank was approved on amendment of the application to show that the Bank would transfer the station; consent to transfer of control to two individuals was granted October 26, 1943 (B5-TC-331).

In *In re Application of Doughty & Welch Electric Co. Inc. (WSAR)*, Docket 5902, involving an application for consent to assignment of license, the Commission's decision of October 16, 1944 stated:

"The Commission has heretofore indicated, in actions upon other applications, that it has serious questions as to whether broadcast stations should be licensed under conditions where responsibility for management would be placed in the hands of trustees without beneficial interest, for management in the manner of trust properties. The duties and responsibilities which devolve upon licensees of broadcast stations should not, in the judgment of the Commission be placed in the hands of persons and organizations whose primary interests are in rendering general trust services as trustees. In this case, the Commission finds that provision has been made for competent interested management of the station by trustees who have shown that it will be a matter of primary interest with them, and the station will be managed by a competent experienced executive. The evidence which has been presented affords assurance that operation of WSAR by the Fall River Broadcasting Company will provide a service which is efficient and at the same time on a broad basis consonant with the obligation of licensees to render service in the general public interest."

court made short shrift of the charges and made findings in favor of the petitioners. At the conclusion of the oral arguments, it said:

> "In the first place, I do not think there is any fraud here: there isn't any evidence of any fraud.
>
> "I don't think that the charges made with reference to the public service company have been substantiated; there has not been any evidence at all on that.
>
> "Now, taking into account these facts, I do not believe I would be justified in entering a decree setting aside this lease. And if you will, prepare a decree along that line" (R. 730).

3. The Nebraska Supreme Court Opinion

The vulnerability of the decision below is well epitomized in the following pronouncement of the majority on its own competence to appraise the complicated, special problems presented:

> "We have considered the testimony of those witnesses that are experienced in radio and those who are experienced in business matters generally giving their opinion that it was a good deal for the society and that the provisions [of the lease] are adequate, but *from our consideration* of the entire record we do not agree with their opinions" (R. 760).

But the real vice of the decision is not that the majority substituted its own judgment for that of *all* of the witnesses qualified to testify on the specialized issues involved, but that it usurped the functions of the expert administrators in deciding those issues. To appreciate this, a detailed review of the opinion is necessary.

The first two questions discussed by the court are of no moment. The opinion first concludes that the Board of Directors of the Society had ample power to authorize a transfer of the radio station (R. 747-748). It next concludes that there is no authority for attempting to "modify" the lease (R. 748-749).

(a) *THE PUBLIC POWER ISSUE*

The third question discussed is of vital public interest, namely, the allegation that the station was to be used as a propaganda mechanism for those interested in the acquisition of private power facilities by public agencies.

This case, it is apparent, was instituted, tried and decided in the midst of a widespread and typically bitter conflict over the public ownership of electric power facilities. This is reflected in the petition (R. 7-8). Its chief point is that the station would be used by the transferee, contrary to the public interest, in advancing the cause of those advocating public ownership. Following the pattern of the pleadings, the plaintiff's case was largely concerned with this issue. (See, *e.g.*, examination of Guy C. Myers (R. 88 *et seq.*); the cross examination of Francis P. Matthews (R. 211 *et seq.*); the examination of John B. Dawson (R. 275 *et seq.*); cross examination of Charles A. Hines (R. 423), cross examination of Farrar Newbury (R. 508 *et seq.*)). Thus, the case was initially pitched on, and throughout continued to take on the character of a controversy over public ownership.

The majority of the Supreme Court of Nebraska assumed this was an issue within its competence and reviewed the matter in detail in its opinion (R. 753-754). While it appeared to make findings throughout in favor of these petitioners, it actually gave to this vital public issue the same cavalier treatment which characterized its opinion on the other public issues involved. It ignored completely the fact that this issue had been brought to the attention of the Commission prior to its approval of the transaction before the court (by Mayor Butler of Omaha) (R. 6), and the fact that respondent himself had failed to intervene before the Commission and support this charge.

The interest of the Commission in, and its jurisdiction over, this issue seem plain. The Commission has consistently refused to license the operation of a radio station failing in its duty to present well-balanced news and comment on public issues, or which itself projects editorially its own

private views on one side or another of controversial public questions.[10]

The Nebraska court, ignoring the general public character of the controversy and the exclusive jurisdiction of the Commission to appraise it, disposed of the issue in the following language:

> ". . . there is no evidence that Consumers has any interest in lessee nor have any of the officers and directors of the society any interest in Consumers or lessee nor can Consumers use any of its funds for this purpose. If any of these parties desired time on this station to explain their plan to the public they could purchase it no matter who owns

[10] See *Trinity Methodist Church South* v. *Federal Radio Commission*, 62 F.(2d) 850 (App.D.C. 1932); *KFKB Broadcasting Assn.* v. *Federal Radio Commission*, 47 F.(2d) 670 (App.D.C. 1931).

In its decision *In the Matter of the Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1940), the Commission had said (pp. 339-340):

". . . The material in the record has been carefully considered and compels the conclusion that this licensee during the period in question, has revealed a serious misconception of its duties and functions under the law. Under the American system of broadcasting it is clear that responsibility for the conduct of a broadcast station must rest initially with the broadcaster. It is equally clear that with the limitations in frequencies inherent in the nature of radio, the public interest can never be served by a dedication of any broadcast facility to the support of his own partisan ends. Radio can serve as an instrument of democracy only when devoted to the communication of information and the exchange of ideas fairly and objectively presented. A truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate.

"'Freedom of speech on the radio must be broad enough to provide full and equal opportunity for the presentation to the public of all sides of public issues. Indeed, as one licensed to operate in a public domain the licensee has assumed the obligation of presenting all sides of important public questions, fairly, objectively and without bias. The public interest—not the private—is paramount. These requirements are inherent in the conception of public interest set up by the Communications Act as the criterion of regulation. And while the day to day decisions applying these requirements are the licensee's responsibility, the ultimate duty to review generally the course of conduct of the station over a period of time and to take appropriate action thereon is vested in the Commission."

> the station and the same amount of time would have to be made available for the other side. It also appears that there is a divergence of opinion among the stockholders of lessee as to the desirability of Consumers acquiring these facilities. The record does not sustain this contention of the plaintiff" (R. 754).

(b) *"CONSTRUCTIVE FRAUD".*

After disposing of the propaganda issue, the court found that there was no plan of the individual directors of the Society to procure for themselves, their friends or associates, control of the radio station and that there was not in the record "any evidence of actual fraud on the part of the officers and directors of the Society" (R. 755).

The majority then proceeded to a discussion of what it chose to term "constructive fraud" (R. 755). It appears to base this upon (1) an appraisal of personal relationships, admittedly non-fraudulent, between Bradshaw, the President of the Society, and Gillin, who for many years had been the station manager and who became the president of the lessee corporation; (2) lack of financial soundness and stability in the lessee corporation and the proposed operations; and (3) a claimed inadequacy of the consideration. Even these stated grounds, regardless of whether they were supported by any evidence, necessarily involved vital public considerations within the jurisdiction and peculiar competence of the Commission.

(1) *Gillin.*—That John Gillin, Jr. was a highly competent operator and manager of this public service is conceded by all.

Niles Trammell, President of the National Broadcasting Company, testified as follows:

> "The management is splendid (R. 548). . . I think the management has been unusually capable, and with Mr. Gillin continuing as Manager I see no reason why it shouldn't conitnue to be one of the better operated stations in the country (R. 556).

> "Mr. Gillin has a very high regard for the public service responsibility of a radio station, and I am certain that the station under his continued management will serve, and serve well, the public of Omaha and the vicinity" (R. 556-557).

J. Harold Ryan, Assistant Director of Censorship for Radio, and later President of the National Association of Broadcasters, himself an experienced and competent radio station operator, testified as follows:

> "The management has always had a very high standing in the industry" (R. 584).

Gardner Cowles, Jr., an outstanding radio executive, testified as follows:

> "I think the management has been excellent in the past and a buyer could not hope to make much improvement in management" (R. 619).

The minority opinion stated:

> ". . . the evidence is overwhelming in establishing Gillin's ability, capacity and standing in the radio field" (R. 763).

President Bradshaw gave a like appraisal of Gillin and testified that he was acting in the interest of the Society, as well as of the public, in taking the position that Gillin's management should continue under the lessee, in which of course the Society continued to hold a financial stake (R. 328-329).

The majority opinion cast suspicion upon the fact that Gillin was receiving a material interest in the lessee corporation in return for his undertaking the continued management (R. 760). The record, however, shows not only that the Society had no control over the relative stock interests in the lessee corporation, but also that Bradshaw's friendship had nothing to do with it (R. 184-185). The record is devoid of any evidence that Bradshaw or the Society

knew the nature of Gillin's interest in the lessee corporation at the time the lease was signed.

The crux of this issue, as it was seized upon by the majority, is that Gillin was to have the continued management of the public service operations of the station and a substantial interest in the venture. These basic facts appeared in the application before the Commission on its approval of the transfer of the station and were an essential part of its considerations (R. 394-395). Hardly any consideration presented to the Commission on a proposed transfer is of more vital importance than that of competent and responsible management on the ground. For all that appears, the Commission might not have approved this very transfer if anyone falling substantially short of Gillin's qualifications and local experience had been proposed as manager. The Commission has stressed in many of its decisions the factor of competency and the desirability of management on the ground by responsible men who live and work as a part of the community served by the station.[11]

Likewise that Gillin was to receive a material interest in the lessee corporation, and, hence, a stake in its success, while frowned on by the Nebraska court (R. 760), was precisely the type of arrangement which the Commission encourages as conducive to the highest quality of public service in the interest of the community itself.[12] The fact, stressed by the Nebraska court, that President Bradshaw knew Gillin, recognized his competence, and took the position that he should continue to exercise it, did not lessen the Commission's concern with the problem. In fact, the very security interest which the majority of the Nebraska court

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[11] *In the Matter of Wilson*, 9 F.C.C. 56, 63 (1941). *In the Matter of Falvey*, 8 F.C.C. 279, 288 (1940); *In the Matter of Voice of Brooklyn*, 8 F.C.C. 230 (1940); *In the Matter of Capitol Broadcasting Co.*, 6 F.C.C. 72 (1938); *In the Matter of Havens & Martin, Inc.*, 6 F.C.C. 237 (1938); *In the Matter of Sapp and Sapp*, 6 F.C.C. 521 (1938); *In the Matter of Hughes*, 5 F.C.C. 120 (1938); *Cf. In the Matter of Federated Publications, Inc.* (*WELL*), 9 F.C.C. 150, 156 (1942).

[12] See cases cited *supra*, p. 42, note 9; p. 49, note 11.

claims to protect would presumably be furthered by the continuance of the Gillin management (R. 328-329). That Bradshaw also saw a public benefit from that continued management only brings his view into conformity with the view and the policy of the Commission and that of all the experts who testified in this case.

(2) *Financial Stability.*—Lack of financial stability of the lessee corporation equally poses a consideration of public interest and one falling within the jurisdiction of the Commission to decide. It is of passing interest that the majority complains in one breath that the lessee will lack financial stability (R. 759-760) and in the next breath that it will be unjustly enriched (R. 756). The latter point is discussed below. At this juncture it is of importance to note that in every case, whether of original license or of transfer, the Commission is charged with the duty of examining into the financial stability of the proposed operating company. Sound fiscal operations must be assured in the public interest. It is vital that the public service be not prejudiced by lack of financial stability, the inability of the licensee to meet its obligations and, hence, its inability to render a competent public service. And, of course, the Commission must thus be assured of a projection into the future of that public service without fear that it may be terminated or jeopardized.[13]

The majority opinion sets forth and places reliance upon the same data as to finances, earnings, capitalization, stock ownerships, classes of stock, dividend rights, etc., of the lessee corporation (R. 752-753, 758-760), which had been presented to the Commission when the transfer was approved (R. 394-403). Some of this data has been summarized above (pp. 8-9). The consent of the Commission,

[13] *E.g., In the Matter of Liberty Life Ins. Co.*, 9 F.C.C. 104 (1942); *In the Matter of Weathersbee*, 8 F.C.C. 105 (1940); *In the Matter of the Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1940); *In the Matter of United Theatres, Inc.*, 8 F.C.C. 489 (1941); *In the Matter of Atwood*, 7 F.C.C. 72 (1939); *In the Matter of Radio Enterprises, Inc.*, 7 F.C.C. 169 (1939); *In the Matter of Roberts-McNab Co.*, 6 F.C.C. 548 (1938). See also *Heitmeyer v. Federal Communications Commission*, 95 F.(2d) 91 (App.D.C. 1938).

indeed, to the transfer of the station was explicitly based "on the statements contained in, or made in connection with, the application" (Ex. 32, R. 661, 662A).

The statute requires the Commission to procure this very data bearing upon stock ownerships and upon financial stability (Section 308(b), 310, 319(a)). And the Commission consistently gives attention to any stock or fiscal irregularities.[14] It cannot, indeed, perform its appropriate functions of issuing licenses in the public interest without acquiring the very information relied upon by the court in passing judgment upon the financial stability of the proposed operator.

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[14] *E.g., In the matter of the Travelers Broadcasting Service Corp.*, 7 F.C.C. 504 (1939); *In the Matter of the WGAR Broadcasting Co.*, 4 F.C.C. 540 (1937).

Thus, recently, in *In re Application of Calumet Broadcasting Corp.*, Docket No. 6583, the Commission designated an application for hearing upon the following issues, among others (Notice of April 20, 1944):

"2. To obtain full information with reference to the method of financing the applicant corporation, and the issuance, ownership, transfer and control of the stock of the applicant corporation.

"5. To determine what contracts, or agreements, or understandings have been executed or entered into relative to the transfer of stock in the licensee corporation, and whether full information has been presented to the Commission relative thereto.

"6. To determine the source of funds used in the purchase of equipment and other property by the licensee and the plans of meeting the operating expenses in the event of a grant of the instant application.

"7. To determine and obtain full information as to the means and methods used by the applicant's controlling stockholders, George F. Courrier and Doris Keane, in acquiring control of the Hammond-Calumet Broadcasting Corporation and the financial transactions involving the issuance, ownership and transfer of stock of said corporation.

"8. To obtain full information as to the various financial statements and information prepared, submitted and offered by George F. Courrier and Doris Keane with respect to the Hammond-Calumet Broadcasting Company."

The applicant subsequently amended his application, and, in acting upon his petition to grant it, as amended, the Commission ordered the application, as amended, designated for further hearing (Order of December 4, 1944), in order, among other things:

"2. To obtain full information with reference to the method of financing the applicant corporation and the issuance, ownership, transfer and control of the stock of the applicant corporation."

There is no assurance, indeed, that the restrictive provisions which the court found necessary to protect the assignor, would not give to the assignor such extensive control that the Commission could not approve a station transfer presenting those features. See *In the Matter of the Liberty Life Ins. Co.*, 9 F.C.C. 104 (1942); *In the Matter of the Travelers Broadcasting Service Corp.*, 7 F.C.C. 504 (1939).

(3) *Consideration.*—The bare question as to adequacy of consideration for the transfer of a public service operation is one more easily stated in legalistic terms than resolved on the basis of the economic and public interest issues presented. The rental alone, apart from other valuable considerations such as the installation of equipment for the newer forms of broadcasting, amounts to $1,111,896 for the 15-year period (Ex. 1, R. 21, 22) for property originally costing $175,000 (R. 581), or little more than twice the average annual rental; and this investment has since been entirely written off (R. 581). It may be noted, in passing, that the majority chose to ignore the uncontroverted testimony of every responsible expert witness who appeared on this subject and to substitute its own judgment on the question of valuation (R. 760).[15]

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[15] Five of the foremost figures in the radio broadcasting industry testified in this case and gave their opinion on the question of the adequacy of the consideration received by the Society under the lease. These witnesses were:

Niles Trammell, President of the National Broadcasting Company:

"I feel that it is more than an adequate consideration for this station in view of the anticipated taxes that will be required of the new owner. Even without the tax consideration, it is an adequate consideration in view of the hazardous nature of the business of broadcasting, the probable developments in the future, and the necessity on the part of the new owners to maintain the equipment and to install the new developments as they come along, such as frequency modulation and television" (R. 544-545).

On cross examination he said in answer to the question of whether the consideration was a fair price: "I think it is more than reasonable . . ." (R. 548).

J. Harold Ryan, President of the National Association of Broadcasters:

Apart, however, from the grave question as to the merits of the court's conclusions, are the significant facts that the court exercised a judgment on this facet of the case relying upon considerations outside its own competence and within the competence of the expert regulatory body; and that the court, in arriving at its conclusion of inadequacy, ran counter to the provisions of the Communications Act of 1934, which forbid the treatment of publicly licensed radio frequencies as property (Sections 301, 307(b), 310(b)).

Before considering these factors, several other factors, overlooked by the majority in its appraisal should be noted. In the first place, it will be recalled that the Society is fraternal and non-profit in character; it was under constant fear that by carrying on commercially a profitable radio operation, not subject to tax, the entire business of the Society might, by legislation, become subject to taxation (R. 15-16, 289, 297-298, 310). The radio operation had been a small fraction of 1% of the entire business of the Society (R. 316-317, 507), and it was felt that the entire business should not be prejudiced through this one small business (R. 286 *et seq.*). Some of the officers also felt that they themselves were not qualified to manage a radio station and that their attention and that of the Board of Directors could better be devoted to the insurance business rather than what to them was a side issue and something of a novelty (R. 289, 317).

"I would have no hesitancy in saying that it is not an inadequate consideration and it seems to me that it is very adequate and I am really surprised that it is as large a figure as you have indicated" (R. 582).

Gardner Cowles, Jr., President of Iowa Broadcasting Company:

"All the facts lead me to believe this is a fair price. . . I think I would have made the terms of the lease approximately what the terms of this lease are" (R. 619).

Joseph O. Maland, Vice President of Radio Station WHO, Des Moines, Iowa:

"In my opinion I believe that the least rental as outlined above is more than adequate and more than could be secured by rental to other people in the radio industry" (R. 647).

Harold Hough, President of Oklahoma Broadcasting Company, Inc.: ". . . the price is not only most adequate, but high" (R. 640).

The majority opinion fails to give weight not only to the validity of this decision by the management, but also to the question of exemption from taxation as affecting the amount of the consideration. Naturally, once a policy was established to dispose of the station, the Society could not expect to effect the disposition into the hands of another non-profit, non-taxed operator. Hence, the value to a commercial purchaser or lessee could not be arrived at on the assumption that the lessee enjoyed the same immunities.

The majority opinion further ignored additional items of consideration and of security accorded to the Society. The property is to be delivered back at the end of the 15-year period with all substituted properties and new installations (Ex. 1, R. 21, 24), the lessee meanwhile maintaining taxes and insurance (Ex. 1, R. 21, 23). Various other restrictive and security provisions were contained in the lease (Ex. 1, R. 21, 23-26).[18]

It is also significant that the lessee undertook to keep in step with the changes in the art and to install new equipment and services accordingly (Ex. 1, R. 21, 23). This is a matter of great moment. Frequency modulation is

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[18] (a) The lessee agreed to maintain the radio station and all of the leased property and to install new equipment which included color television.

(b) The lessee agreed to pay all taxes.

(c) The lessee agreed to maintain and pay all insurance.

(d) The lessee agreed to turn back not only the property originally leased but at the end of the 15-year term to deliver back all substituted property and all new installations.

(e) In the event of default in the payment of rent continuing for 30 days, the lessee agreed to return all of the then leased property, books, records, accounts and outstanding contracts.

(f) The lessee agreed not to pay excessive salaries or expense accounts and was limited to a salary of $250.00 per month or an expense account of $100.00 a month during any default in payment of rent.

(g) All funds of the lessee are required to be deposited in a bank to be mutually agreed upon, and all bills shall be paid by check.

(h) The Society is given the right to examine the books and accounts of the lessee at any time.

(i) In the event of any default whatsoever under the lease the Society may recover the leased property or exercise any other legal right that it may have.

mature and ready for exploitation. The Commission, after extensive hearings, has set aside a large number of frequencies to be used in broadcast operations by this improved form of audio-radio.[17] Fifty-three FM stations have already been authorized; more than 250 applications are pending before the Commission.[17] That it will move rapidly into competition with amplitude modulation broadcasting is something of which that the Commission, of course, is currently aware.[17] The expenses of these installations are substantial, perhaps greater than for amplitude modulation. That FM will involve heavy plant investment and heavy operating expenses, and at the same time will offer a competition and division of audiences and of advertising revenues with the present AM broadcasting, is a matter well known in the industry and certainly peculiarly well known by the Commission.[18]

Television, too, has been commercially authorized. In the course of a few years it will develop rapidly. Radio channels have been set aside by the Commission for commercial operations in the band from 50 to 294 megacycles, and for experimental operations in the band above 300 megacycles.[19] The television installation will be many times more expensive than even the FM installation. Its operating expenses will be still heavier. Sizeable operating losses in both FM and television broadcasting are in order for several years.[20] Here again, the Commission is the public body, and only public body, competent to review the facts; and it is the only public body which has the competence to

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[17] Federal Communications Commission, Report of Proposed Allocations from 25,000 Kilocycles to 30,000 Kilocycles Docket No. 6651, January 15, 1945, p. 67.

[18] Federal Communications Commission, Docket No. 6651, Exs. 172, 173; Hearings on S. 814, Senate Interstate Commerce Committee (78th Cong., 2d Sess.), p. 864.

[19] Federal Communications Commission, Report of Proposed Allocations (*supra*, n. 17), p. 85.

[20] Federal Communications Commission, Docket No. 6651, Ex. 263; Hearings on S. 814 (*supra*, note 18), p. 861.

appraise the financial obligation of a licensee undertaking to develop these new arts, and the impact of that obligation, not merely upon the appropriateness of a sale or rental price but upon the licensee's financial qualifications to carry on in the future successfully.

An essential feature of the court's conclusion on consideration is its own analysis of various other negotiations (R. 757-758). *The majority did not base its decision on consideration alone.*[21] It relied also upon the quite different factors discussed above (pp. 45-52), such as Gillin's relations to Bradshaw and the security provisions of the lease. And in its attempted appraisal of the facts "leading up to" the negotiation of the lease terms, the majority moved squarely into the field of Commission competence.

Thus, the court stresses the efforts of the Omaha World Herald to acquire this station in 1936 and in 1937, and observes significantly that nothing came of these negotiations (R. 757-758). It is of interest that the court *again* complains "that the World Herald again made efforts to acquire the station but were turned down until the negotiations hereinafter discussed were completed" (R. 758). It is not entirely clear why the court was solicitous over this particular would-be purchaser, but it is certain that the Commission would never have given an offer from the Omaha World Herald the weight attached to it by the Nebraska court for two reasons. The Omaha World Herald has for many years owned one station in Omaha (KOWH, operating daytime on 660 kilocycles with 500 watts, *Radio Annual, 1944* (Radio Daily, p. 492)). Under the Commission's policy against ownership of more than one station

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[21] The majority stated: "If the question of inadequacy of income alone were to be the sole guide to our determination in this matter it would be a serious question, whether or not the lease should be set aside, but in determining this question we must carefully analyze the facts leading up to its disposition together with the terms and conditions thereof . . ." (R. 756-757).

by the same interest in the same locality[22] there is a serious question whether the World Herald could have acquired Station WOW.

Moreover, the World Herald issues a morning and evening edition and is the only daily newspaper in the city of Omaha.[23] In circulation it occupies a dominant position in the State of Nebraska. Radio Station WOW, Inc. has the greatest electrical coverage and service area in the vicinity of Omaha and the most successful public operation of any radio station in the State. A transfer of WOW to this newspaper would raise one of the gravest questions of public policy with which the Commission has been concerned. Extensive consideration in prolonged public hearings has been given to the problem of newspaper ownership of radio stations.[24] Stressed in those hearings were cases precisely like the one theoretically projected by the Nebraska court as one of the grounds for its conclusions of constructive fraud, that of a single widely dominant newspaper acquiring the outstanding radio station in the same vicinity.[25] In concluding those investigations the Commission said:[26]

> "Aside from the specific question of common ownership of newspapers and radio stations, the

[22] The Rules and Regulations of the Federal Communications Commission provide (Sec. 3.35):

"*Multiple Ownership.* No license shall be granted for a standard broadcast station, directly or indirectly owned, operated or controlled by any person where such station renders or will render primary service to a substantial portion of the primary service area of another standard broadcast station, directly or indirectly owned, operated or controlled by such person, except upon a showing that public interest, convenience and necessity will be served through such multiple ownership situation."

[23] Editor and Publisher, *International Year Book* (1944), Vol. 77, No. 5, p. 68. It has a combined daily circulation almost three times as large as that of the next biggest newspaper in Nebraska. *Ibid.*

[24] Federal Communications Commission, *In re Orders 79 and 79A*, Docket No. 6051.

[25] *Ibid.* Exs. 8, 27-64; Tr. 405-583.

[26] *Ibid.* Public Notice, January 13, 1944, Docket No. 6051.

Commission recognizes the serious problem involved in the broader field of the control of the media of mass communications and the importance of avoiding monopoly of the avenues of communicating fact and opinion to the public. All the Commissioners agree to the general principle that diversification of control of such media is desirable. The Commission does not desire to discourage legally qualified persons from applying for licenses, but does desire to encourage the maximum number of qualified persons to enter the field of mass communications, and to permit them to use all modern inventions and improvements in the art to insure good public service.

"In the processing of individual applications for licenses, the Commission will inquire into and in its decisions give expression to 'public interest' considerations. The Commission does not feel that it should deny a license merely because the applicant is engaged or interested in a particular type of business. However, it does not intend in granting licenses in the public interest to permit concentration of control in the hands of the few to the exclusion of the many who may be equally well qualified to render such public service as is required of a licensee."

This, at least, raises a serious question not only of the ultimate effect and validity of any contract to transfer the station to the World Herald, but of the weight to be given an offer for such transfer, both questions upon which only the Commission is qualified to pass.[27]

Again, the majority of the court relied upon negotiations with the National Broadcasting Company to advance money by way of mortgage which NBC refused, and a later discussion of a lease which was to include an option

[27] *In the Matter of Butler*, 9 F.C.C. 141 (1942); *In the Matter of Courrier*, 9 F.C.C. 139 (1942); *In the Matter of Puerto Rico Advertising Co., Inc. (WPRA)*, 9 F.C.C. 181 (1942); *In the Matter of Scripps*, 9 F.C.C. 206 (1942).

to purchase (necessitating a transfer of license) (R. 757-758). Those negotiations, under the Commission's regulations cannot be legally consummated,[28] yet the Nebraska court relied on them in some degree as an indication that the rental actually received was inadequate. In doing this the court ignored the direct testimony of NBC's own president that the consideration here involved "is more than an adequate consideration" in the light of the tax situation, the hazards of the business, and the obligation to keep step with new developments (R. 544-545).

There is one additional and vital defect in this effort of the majority of the Nebraska court to evaluate these properties. Its conclusion can logically be traced in part to a capitalization of the profits in recent, as distinguished from prior, years. This lease involved, in addition to other substantial considerations mentioned above, the payment of $1,111,896 over a 15-year period (Ex. 1, R. 21, 22).

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[28] Sec. 3.106 of the Commission's Rules and Regulations provided:

"No license shall be granted to a network organization . . . for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing."

In *In re Application of The Sidles Co.*, Docket No. 6622, the Commission set for hearing applications involving interests of a national network in stations in Charlotte, North Carolina and Lincoln, Nebraska and specified the following, among other, issues (Notice of January 13, 1944):

"5. To determine the character and extent of existing broadcast facilities in Charlotte, North Carolina, and whether the licensing and operation of Station WBT as contemplated in the application for consent to assignment of license and transfer of control (B3-AL-403 and B4-TC-363, respectively) would be consistent with the provisions of Commission Regulations, particularly Section 3.106.

"6. To determine whether the acquisition by Columbia Broadcasting System, Inc. of a stock interest in KFAB Broadcasting Company, in the light of the existing and proposed network affiliation agreements between Columbia Broadcasting System, Inc. and KFAB Broadcasting Company, would constitute an extension of control of standard broadcast stations by a network."

The determination of similar questions, upon which the Court did not and could not pass, was necessary here.

The entire cost, which had already been written off, was little more than twice the average annual rental rate (R. 581).

In placing emphasis upon these recent profits, the court ignores the greatest single cause which gives rise to the larger profits. Even with the highly competent management, it could not be expected that if everyone were free to go into the radio broadcasting business the profits would remain so high. Competition is always trying to move into this field. It is a well-known fact that the radio frequencies are limited, that there can be only a very few stations in a given city. Without this public grant of the use of a public facility and the necessary element of monopoly which goes with it, these profits would hardly be conceivable. The method, apparently adopted by the court below (R. 756), of capitalizing profits to arrive at a valuation is one of the surest ways of running counter to the declared purpose of Congress in the Communications Act of 1934, "to provide for the use . . . but not the ownership" of radio frequencies (Section 301). As this Court said in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475:

> "The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license."

Moreover, in terms of the broad public interest, the question is whether a State court should be allowed to insist upon such valuations as will make public service in the field of radio broadcasting not a highly personalized, competent public service, but so expensive an enterprise as to be open only to large financial interests, excluding the average citizen with the competency and character of the licensee before the Court.

4. The Decree

In addition to deciding questions within the purview of the Commission in holding that the respondent was

entitled to recovery, the court below, in the relief which it provided, arrogated to itself the Commission's functions of determining whether a particular broadcast operation should be carried on, and if so, by whom.

The Commission's order of December 15, 1942 (Ex. 32, R. 661, 662A) granted consent to the assignment of the license "authorizing operation of the transmitting apparatus located at No. 56th & Kansas Avenue, Omaha, Nebraska" from the petitioner society to petitioner WOW, Inc.; and provided that, upon the completion of the transfer of the station, *"the assignee is authorized to begin the operation of the station in accordance with all the terms and conditions of said station license."* An essential predicate for this authority was, of course, that the assignee obtain the station under lease. Indeed, the order itself provided (R. 662A):

> "The Commission's consent to said assignment is based on the representations made by the assignor and/or assignee . . . that the undertakings of the parties upon which this assignment is authorized will be carried out in good faith."

The decree of the court below, however, ordered:

> ". . . that the lease to the station, . . . and the transfer of the license to operate the station be vacated and set aside . . . that the license to operate the station be returned and that lessee is directed to do all things necessary for that purpose" (R. 761).

On its face, therefore, the decree purports to determine that Radio Station WOW is to be operated, by the Society and not by Radio Station WOW, Inc.—a matter for determination by the Commission alone. (As to possible objections by the Commission to a new grant to the Society, *Cf.* Commission's decisions cited *supra*, footnote 9, p. 42.)

It should be noted that the original license assigned to Radio Station WOW, Inc. expired in 1943, and that the

Commission, since then, has *twice* issued new licenses to that company, one effective February 17, 1943 (Appendix C, p. 89), the other effective June 1, 1944 (Appendix C, p. 91). In issuing these renewal licenses, the Commission, under Section 307(d) of the act, was "limited to and governed by the same considerations and practice which" affected "the granting of original applications," and was therefor obliged to determine that, *as of these later dates,* the operation of the station by Radio Station WOW, Inc. would serve "public interest, convenience, or necessity." Thus, the judgment below overrode the determinations of the Commission not only as of the date of the original transfer, but also as of the dates of the later license renewals.

To be sure, in its opinion on rehearing, the court below interpreted its decree, without, however, changing either its language or its substance (R. 797). Although stating that "the question of the federal license . . . [is] . . . a question solely for the Federal Communications Commission" (R. 797), and that it "is a matter that does not concern this court and is not involved in the decision of the case now before us" (R. 797), the court affirms that "the effect of our former opinion was to vacate the lease of the radio station and to order a return of the property to its former status" (R. 797). The avowed recognition of Commission jurisdiction is verbal only; it is but further proof that the separation of "license" and "property" upon which the court relied is untenable. For, in fact, by the decree the court as effectively usurps the Commission's jurisdiction as if it undertook itself to perform the licensing functions entrusted to the Commission. A description of the effect of the decree upon the administrative action of the Commission makes this plain.

In the first place, by transferring the station to the petitioner Society, the decree immediately vitiates the existing license for the operation of Station WOW; for as we have shown (*supra*, pp. 36-40), a license to broadcast cannot subsist without the facilities and the operation of the station which are the very subject matter of the license itself. Even in normal times, when equipment and other

materials are available, the service would be stopped and the license nullified; only after the substantial delay of proceedings before the Commission to obtain a construction permit under Section 319(a), the acquisition of materials and construction of the station pursuant thereto, and the issuance of a new license for the new facilities and a new operation under Section 319(b), could service to the public be restored. *A fortiori,* does the decree have the effect of stopping service and annulling the license at the present time, when, because of war time scarcity, it is impossible to acquire the equipment and materials necessary to build a station. The Commission, moreover, on April 27, 1942, adopted the policy "to grant no application for an authorization involving the use of any materials to construct or change the transmitting facilities of any standard . . . broadcast station." Policy Memorandum Opinion of April 27, 1942, 9 F.C.C. 356. Subsequent modifications permitting construction of a new station in communities not receiving any service would not be applicable (see F.C.C. Statement of Policy, January 16, 1945) since Omaha has three other stations. The unavoidable consequence, therefore, of the court's decree is to expunge an essential broadcast service which the Commission has authorized. Thus, the court, not the Commission is determining whether a broadcast service shall be authorized and continued.

In the second place, besides nullifying the license of WOW, Inc., the decree below determines that if the broadcasting service hitherto carried on is to be revived at all, the license therefor can be granted by the Commission only to the Society, since it alone will have the physical means which are a *sine qua non* for the issuance of a broadcast authorization.

Thus, the decree below presents the Commission with this choice—accept the deletion of a broadcasting service or accept the dictation of the court as to who shall be authorized to carry on the broadcast operation, if it is to be carried on at all. The choice presented is, in fact, no choice at all. Not to accept the determination that the Society shall be

granted a license would involve the onus of terminating an essential public service—more significant than ever in war time. (*Cf. In the matter of the Revocation of License of the Panama City Broadcasting Co.* (*WDLP*), 9 F.C.C. 208, 218-219 (1942)). Yet, to accept the dictation that a frequency shall be assigned, and a broadcast operation authorized, to the Society would involve the abdication of a power entrusted exclusively to the Commission to choose licensees, in the public interest, and would fly in the face of its earlier determination that assignment of the license out of the Society to WOW, Inc. was "in the public interest" (Section 310(b)).

In any case, it is plain that the alternative presented to the Commission makes its choice an involuntary one and almost completely removes the exercise of its administrative discretion. Whichever horn of the dilemma the Commission may be forced to accept, the court has effectively performed the Commission's functions and left it with the power only to give the stamp of formal approval to what has already been decided. This is a plain invasion of the jurisdiction of the administrative body charged with the responsibility of effectuating the congressional purpose of providing "the maximum benefits of radio to all the people of the United States" (*National Broadcasting Co.* v. *United States*, 319 U.S. 190, 217), and of issuing and deleting licenses according to its own exclusive determination that the public interest will thereby be served.

Even if the court were to enter a different judgment and make the facilities available to whichever of the two parties the Commission deemed most in the public interest, so that it could be assumed, contrary to the actual situation, that a choice between the two parties were still available, the Commission would, nevertheless, be hamstrung in its efforts effectively to perform its functions and exercise its unfettered discretion in the choice of licensees. Both of these parties are directed to take all steps to effect the retransfer of the license to the Society. All parties are under legal mandate to promote the retransfer; presumably, none

is free to submit evidence to promote or in any manner advocate the continuance of the operations in the hands of the licensee. Presumably, no party would be free to make either an original argument or to take an appeal from a Commission decision conforming to the Nebraska decree. In a controversy of this kind, it would be serious enough that the parties themselves are handcuffed and required by mandate of the court to present only one side of the case. But it would be intolerable if the federal agency charged with the protection of the public interest in the choice of licensees were itself incapacitated to perform its duty.

C. SINCE THE JUDGMENT BELOW INVOLVES AN INVASION OF THE COMMISSION'S JURISDICTION, THE PRESENT SUIT CANNOT BE MAINTAINED

We have, then, the following situation: The Commission, charged with the affirmative duty of securing the best possible radio service to the public and, to that end, endowed with jurisdiction to chose its own licensees, approves the assignment of license of Station WOW from the Society to WOW, Inc., and authorizes WOW, Inc. to operate the station. The respondent, knowing of the pendency of those proceedings, fails to make any move to intervene before the Commission to object to the transfer of the station, relying instead upon the representations of the Mayor of Omaha, sues in a State court, alleging, *inter alia*, the insufficiency of the showing before the Commission, and on appeal obtains a judgment.

This judgment rests on substantially the same facts as those presented to the Commission and involves a determination of public interest questions, all of which were within the peculiar competence of the Commission and some of which, at least, were plainly determined to the contrary by the Commission in authorizing WOW, Inc. to operate the station "in the public interest." This judgment also nullifies the prior action of the Commission which authorized that operation and usurps its functions by effectively determining when, by whom, and at what rental figure broadcast operations shall be carried on.

Such a judgment is vulnerable since both the questions decided and relief granted impinge upon the administrative functions of the Commission. Courts cannot, under well-established principles, be permitted to undertake to decide and do what the Congress has prescribed to be the responsibility of an expert tribunal. *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426; Note, 51 Harv.L.Rev. 1251 (1938). Also see *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41.

"Of course, no court can grant an application or authorization which the Commission has refused." *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4, 14. Nor can a court be permitted in any other manner to usurp the functions of the Commission—to circumscribe its exercise of administrative discretion or decide matters confided to it. The determination of the public interest questions affecting radio is "lodged in the Commission. It is the only proper agency to decide these public questions." *Black River Valley Broadcasts, Inc.* v. *McNinch*, 101 F.(2d) 235, 237 (App.D.C. 1938).

1. *The Type of Relief Granted Alone Prevents Maintenance of This Suit.*

As we have shown (*supra*, pp. 60-65), by setting aside the lease of Station WOW's facilities and ordering their return to the Society, the court takes from the licensee the subject matter of the license and vitiates the license.

Entirely apart from any consideration of the public interest questions, determination of which was an essential part of the grounds for the decision, the judgment annuls and sets aside the Commission's order—relief which, under Section 402(a) of the Communications Act, can be granted only by a three-judge Federal court. *Federal Communications Commission* v. *Columbia Broadcasting System of Cal.*, 311 U.S. 132; *National Broadcasting Co.* v. *United States*, 316 U.S. 447. It is immaterial that the Commission's order was permissive and not mandatory. So is it immaterial that the court purported to deal only with "property" and not with the "license", and vitiated the

Commission's order by backing into it rather than by striking head on. By the decree, the Commission's order was as effectively nullified as if the court specifically enjoined the licensee from carrying out the Commission's authorization. "An order [of the Interstate Commerce Commission] may be as effectively annulled by misconstruction as by avowedly setting it aside." *American Express Co.* v. *Caldwell*, 244 U.S. 617, 628.

The test is whether the relief granted forbids what the Commission authorized. Thus, in *Venner* v. *Michigan Central R.R.*, 271 U.S. 127, a minority stockholder sought, in a State court, to enjoin a railroad from entering into joint arrangements for the purchase of locomotives which the Interstate Commerce Commission had authorized. In holding that the suit could not be maintained, the Court said (pp. 130-131):

> "We agree with the court below that the suit is essentially one to annul or set aside the order of the Commission. *While the amended bill does not expressly pray that the order be annulled or set aside, it does assail the validity of the order and pray that the defendant company be enjoined from doing what the order specifically authorizes, which is equivalent to asking that the order be adjudged invalid and set aside. . . . That the order is not mandatory, but permissive makes no difference in this regard.*"

See also *Lambert Run Coal Co.* v. *Baltimore & Ohio R.R.*, 258 U.S. 377; *North Dakota ex rel. Lemke* v. *Chicago & Northwestern Ry.*, 257 U.S. 485; *Baldwin* v. *Starks*, 107 U.S. 463; *State ex rel. Davis* v. *Atlantic Coast Line Ry.*, 103 Fla. 1204, 140 So. 817 (1932); *Southern Ry.* v. *Georgia*, 188 Ga. 569, 4 S.E. (2d) 233 (1939); *Illinois* v. *Illinois Central R.R.*, 324 Ill. 591, 155 N.E. 841 (1927); *St. Louis Connecting R.R.* v. *Blumberg*, 325 Ill. 387, 156 N.E. 298 (1927).

Similarly, even if the relief here granted were meritorious and were predicated solely upon a vindication of asserted private rights not involving questions of public concern, the suit would be no less one to annul the Commis-

sion's order. In *Village of Mantorville* v. *Chicago Great Western R.R.*, 8 F.Supp. 791 (D.Minn. 1934), the Interstate Commerce Commission had authorized the defendant to abandon part of its line. Thereafter, plaintiff sued in a State court to enjoin defendant from abandoning the line, or for damages, alleging a contract by defendant to continue service on the line. On removal, the Federal court, without passing on the possible right to other relief, dismissed the suit for specific relief, saying (pp. 793-794, 796):

> "The complaint does not in so many words seek to annul or modify the order of the Interstate Commerce Commission, and apparently bases its right to an injunction on the so-called contract right contained in the deed heretofore described, but manifestly the ultimate purpose of the action is to require the defendant to refrain from doing that which the Interstate Commerce Commission in its order stated it might do. . . .
>
> "Public convenience and necessity are not determined by a Commission merely to protect the railroad, but to protect interstate commerce from onerous burdens which may affect the efficiency and the ability of the carrier to perform its duty to the public. . . .
>
> ". . . the vital interest of the United States in supervising the interstate service rendered by this defendant company cannot be suspended and cancelled by a collateral proceeding, which would be the result if the court granted the relief asked by the plaintiff herein."

The view expressed in certain of the railroad cases (see *Pittsburgh & W.Va. Ry.* v. *United States*, 281 U.S. 479. But *cf. Chicago Junction Case*, 264 U.S. 258; *Central New England Ry.* v. *Boston & Albany R.R.*, 279 U.S. 415, 420-421) that the nature of the ground relied upon for relief is relevant to whether a suit is one to set aside an order of the Interstate Commerce Commission, misconceives, we believe,

the basic consideration involved. The test is not what contentions are made as a basis for relief, or whether they are pertinent to administrative action in the public interest and might therefore be advanced before the administrative tribunal.[29] Indeed, in many of the cases holding that court

[29] Sec. 1.102 of the Rules and Regulations of the Federal Communications Commission provides:

"Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, the facts on which the petitioner bases his claim that his intervention will be in the public interest. . . ."

The effect of the last clause has been considerably changed as the result of the decision of this Court in *Federal Communications Commission* v. *National Broadcasting Co., Inc. (KOA)*, 319 U. S. 239. Action of the Commission in this respect has not been uniform. Thus, a minority stockholder and holder of an alleged option to purchase stock has been permitted to intervene in a proceeding involving an application for consent to transfer control of a license where he asserted that the transfer was prejudicial to his interest. Petition for Leave to Intervene by Richard G. O'Day, *In the Matter of Application of Arde Bulova for Consent to Transfer Control of Wodaam Corp. (WOV)*, Docket No. 6598, Decision of July 5, 1944. An earlier case is to be distinguished on its facts (*In the Matter of Application of Cosmopolitan Broadcasting Co. for Consent to Assignment of License (WMCA)*, (Order dated November 16, 1943, File No. B1-AL-390). Donald Flamm, formerly held a controlling interest in Station WMCA in New York City. He sold the station to Noble. Flamm and Noble applied to the Commission for consent to transfer. This was granted and accordingly Flamm made the conveyance. Thereafter, Flamm filed a bill in equity against Noble in the Supreme Court of New York County seeking a rescission of the transfer on the ground of coercion in the negotiation (*Flamm* v. *Noble*, Sup. Ct. N.Y. Co., No. 15784, 1943). Still later, Flamm amended his petition in order to present a suit for damages at law rather than a case in equity. Three years after his acquisition of the station and with this suit pending, Noble contracted to transfer the station to Nathan Straus. Noble and Straus applied to the Commission for consent to transfer. Flamm then moved to intervene in this later proceeding albeit he was neither a licensee nor the holder of any interest in a licensee. His stated purpose was to postpone commission proceedings pending disposition of his private suit. The Commission declined to permit this intervention stating that it "had no power to act with respect to these matters and any action it takes in the present proceedings will not affect the court's jurisdiction." By way of dictum the Commission stated that the court had exclusive jurisdiction to decide the

proceedings could not be maintained because their effect would be to nullify action of the Interstate Commerce Commission, the grounds relied upon in the court proceedings were entirely irrelevant, and made expressly so by Congress, to action taken by that Commission in the public interest.

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issues in the pending litigation with respect to the physical properties and other assets of the station, at the same time asserting that the Commission itself had exclusive jurisdiction to determine whether in any particular case the license should be assigned in the public interest. It concluded: "Commission consent to the proposed assignment therefore does not affect any remedy which it is within the court's power to afford."

The case adopts the view of an earlier decision, *In the Matter of Buffalo Broadcasting Corp.*, 9 F.C.C. 31 (1941), where a holder of a contract under which a licensee agreed to give a mortgage on its land, buildings and equipment sought to intervene in proceedings involving a change of location and installation of a new transmitter in order to obtain security on the proposed new equipment and location. The Commission, saying (9 F.C.C. at 32) that "the enforcement" of the contract with respect to security "is a matter over which the Commission has no jurisdiction", dismissed "the petition to be made a party intervenor and for affirmative relief . . . without prejudice to any contract or property right of petitioner or its right to proceed before other tribunals."

The *Buffalo* decision was obviously correct as the Commission is not the tribunal to order specific performance of contracts to give security. Such relief is for the courts to give. But this does not mean that other relief can be given by a State court which will encroach upon the Commission's jurisdiction or nullify action taken by it. Likewise, we do not believe that the general language in the WMCA case can properly be construed as countenancing State court action which will invade the Commission's jurisdiction or amount to a performance by the court of the Commission's functions.

Furthermore, both of these cases represent an enforcement of the basic policy of the act that public interest should be paramount over enforcement of private remedies. As the Commission stated in the Flamm case:

". . . No fact which petitioner proposes to establish will in any way reflect upon the desirability of a transfer to the proposed licensee. Consummation of the transfer is not to be held up, perhaps for years, pending settlement of issues in private litigation unrelated to the proposed operation."

It is also significant that both of these cases involved private issues and in neither, contrary to the instant case, were the questions involved of a public interest character. And see *supra*, note 13, p. 50; note 11, p. 49, for cases where the Commission takes cognizance of facts reflecting upon the financial responsibility and character of proposed licensees.

See *e.g., Venner* v. *Michigan Central R.R.*, 271 U.S. 127. The correct test, therefore, is whether Congress intended to permit the nullification of administrative action taken in the public interest, whatever the ground relied upon.

The correct result, we believe, was reached in the *Village of Mantorville* case (8 F.Supp. 791, *supra*), holding that relief, nullifying Commission action, can be given only by the appropriately designated Federal courts. As stated in *Central New England Ry.* v. *Boston & Albany R.R.*, 279 U.S. 415, 420-421, actions cannot be brought in a State court where

> ". . . affirmative relief was prayed directing, either that the order be set aside, or that the carrier do or refrain from doing acts in a manner inconsistent with the order of the Commission directing or permitting certain administrative acts to be performed, relief which, it was held, would operate practically to set aside the order of the Commission."

In any event, the doctrine of the *Pittsburgh & W.Va. Ry.* case, even if deemed satisfactory for the Interstate Commerce Commission, is not lightly to be extended to the field of broadcasting. As we have argued (*supra*, pp. 30-33), broadcasting has a cultural, social and political significance which transcends traditional concepts of the nature of "public interest". It is one thing for the courts to hold that suits seeking relief inconsistent with the orders of the Interstate Commerce Commission are not suits to set aside those orders, maintainable in a Federal three-judge court, on the assumption that Congress did not intend that Commission to concern itself with the intra-corporate matters put in issue. It is quite another thing, however, to apply the same assumption to the Federal Communications Commission.

On this issue, there are significant differences between the field of radio broadcasting and that of rail transportation. In the field of freight and passenger transportation, the dominant concern was to prevent excessive or discriminatory rates, and while the scope of control has gradually been enlarged, the Interstate Commerce Commission was

never much concerned with identity of ownerships, or with character, experience and like qualifications (*cf.*, Cushman, *The Independent Regulatory Commissions* (1941), pp. 37 *et seq.*). In the field of radio, on the other hand, the identity of the station owner, his character, financial stability, experience and skill in the handling of entertainment, and integrity in the handling of news and ideas is of paramount concern to the Communications Commission, and there is no basis for a presumption that Congress did not intend the Commission to concern itself with what, in the case of the Interstate Commerce Commission's jurisdiction, might well be regarded as private issues. It would seem that all such issues should be treated as primarily for Commission decision, and that suits, whatever the ground relied upon, to nullify action of the Commission should be limited to the Federal courts pursuant to Section 402(a) of the act.

But whether or not the relief granted by itself makes this suit one to set aside and annul the Commission's order within Section 402(a), it still is the type of relief which cannot be granted by a State court. And the *Pittsburgh & W.Va. Ry.* case does not decide the contrary. To permit such relief to be granted by other than a three-judge Federal court in reviewing the Commission's orders, would effectively thwart federal public policy in the control of radio.

It has been a long-established principle of public policy that courts, in suits to enforce private remedies, will deny relief which will prejudice the public interest. Thus, courts of equity will not, for example, order specific performance of a contract to build a railroad by a specific route (*Hoard* v. *Chesapeake & Ohio Ry.*, 123 U.S. 222, 236), or to maintain machine ships at a particular location (*Texas & Pac. Ry.* v. *Marshall*, 136 U.S. 393, 405), or grant an injunction against building a depot in violation of a contract (*Beasley* v. *Texas & Pac. Ry.*, 191 U.S. 492, 497; *Armour & Co.* v. *Dallas*, 255 U.S. 280; *Seaboard Air Line Ry.* v. *Atlanta B.& C. R.R.*, 35 F.(2d) 609 (C.C.A. 5th, 1929). See also *Elliott Nursery Co.* v. *Duquesne Light Co.*, 281 Pa. 166, 126 Atl. 345 (1924). Similarly, rights against property used in carrying out a public franchise will not be enforced so as

to separate property from the franchise and thereby prejudice public interest in the continuation of the service. *Gue* v. *Tide Water Canal Co.*, 24 How. 257, 263; *East Alabama Ry.* v. *Doe ex dem. Visscher*, 114 U.S. 340, 351; *Ackroyd* v. *Winston Bros. Co.*, 113 F. (2d) 657, 659-660 (C.C.A. 9th, 1940); *Louisville N.A.& C.Ry.* v. *Boney*, 117 Ind. 501, 506-509, 601, 20 N.E. 432 (1889); *Brady* v. *Johnson*, 75 Md. 445, 449, 26 Atl. 49, (1892); *Northern Pac. R.R.* v. *Shimwell*, 6 Mont. 161, 164-165, 9 Pac. 889 (1886); *Overton Bridge Co.* v. *Means*, 33 Neb. 857, 859-860, 51 N.W. 240 (1892); *Sherman County Irrig. W.P. & I.Co.* v. *Drake*, 65 Neb. 699, 700, 91 N.W. 512 (1920); *Foster and Co.* v. *Fowler and Co.*, 60 Pa. St. 27, 30-31 (1868). Thus the decision in the *Village of Mantorville* case was sound whether or not the ground relied upon was correct.

The Communications Act should, we submit, be interpreted in accordance with this general policy, which would seem peculiarly appropriate in the congressional scheme for a single unified control of radio. By the Communications Act, Congress declared its purpose "to maintain the control of the United States over all the channels of interstate and foreign radio transmission" and "to provide for the use of such channels . . . under licenses granted by Federal authority" (Section 301(a)). For this purpose and "to make available . . . to all the people of the United States a rapid, efficient, Nation-wide . . . radio communication service," it established a single expert body, the Commission (Section 1). The Commission was charged with securing "the larger and more effective use of radio" (Section 303(g)) and endowed with plenary authority to choose licenses "in the public interest" to that end.

Congress, we believe, did not intend that these purposes and powers should be thwarted by private law suits, that the federal control thus established over radio channels should be so weak as to permit contradictory control over those channels like that involved in the relief below, or that the functioning of the expert tribunal should be subject to varied dictation of State courts. Such a result would nullify the basic purpose of Congressional action—to ensure that public interests were made paramount to private. It

would not only be contrary to the strong common law policy against relief prejudicial to the public interest (see cases, *supra*, p. 37), reinforced by Congressional act in the case of radio, but would destroy the integrity of the administrative tribunal charged with carrying out that Congressional public policy. Such disruption of both common law policy and legislative command, we submit, should not be permitted to stand. *Cf. New York* v. *New York Central R.R.*, 275 N.Y. 287, 9 N.E.(2d) 931 (1937); *Ford* v. *Oregon Elec. Ry.*, 60 Ore. 278, 117 Pac. 809 (1911); *Corstvet* v. *Bank of Deerfield*, 220 Wis. 209, 263 N.W. 687 (1936); see *Beasley* v. *Texas & Pac. Ry.*, 191 U. S. 492, 497-98. State courts cannot be permitted to give commands which conflict with regulatory action of Congress as exercised through federal administrative agencies. See Note 51 Harv.L.Rev. 1251, 1257-58 (1938).

The only basis indicated (as by *Pittsburgh & W.Va. Ry.* v. *United States*, 281 U. S. 479) for holding that particular suits to nullify administrative action were not to be considered as suits to "set aside" an order, for the purpose of provisions similar to Section 402(a), is that the issues raised were unrelated to the discharge of the functions placed upon the administrative body. If that is so—if the issue set up is irrelevant to the determination of the public interest, convenience and necessity in a particular matter—then certainly it should not be recognized as the basis for undoing that administrative determination. The result most consistent with the paramount federal policy involved in the field of broadcasting is to restrict jurisdiction over suits to nullify Commission action to the tribunals prescribed by Congress in Section 402(a), and before which Congress has authorized the United States to be made a party defendant.

Such a result, we believe, gives due regard to both public and private interests and affords an appropriate realization of each. Nor does this result in any way conflict with the reservation of common law remedies in Section 414 of the act. This provision was drawn from and is peculiarly pertinent to regulation of common carriers. It was not present in the Radio Act of 1927 and appears in the Communications Act of 1934 only as the result of the trans-

fer of regulation of common carriers to which it had previously been applicable.[30] In view of the purpose of the Communications Act to centralize authority and to grant additional authority (Section 1), this provision cannot be construed to reduce federal control over radio below what it was under the Radio Act of 1927 when the regulation of radio was separate. Moreover, it is clear that the provision has no application to a suit which intimately involves and, indeed, conflicts with the policy of the act itself. *Texas & Pac. Ry* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446-447; *Armour & Co.* v. *Alton R.R.*, 312 U.S. 195, 196.

On any theory, moreover, the suit would seem to be one requiring the joinder of the United States within the principles announced in *Lambert Run Coal Co.* v. *Baltimore & Ohio R.R.*, 258 U. S. 377, 382. The Court there pointed out:

> ". . . there are . . . two fundamental objections to the jurisdiction. First, the United States, an indispensable party to a suit to restrain or set aside orders of the Commission, was not joined, and could not be, for it had not consented to be sued in state courts. Secondly, such suits are required to be brought in a federal District Court. . . . As the state court was without jurisdiction over either the subject-matter or the United States, the District Court could not acquire jurisdiction over them by the removal."

2. *In Any Event, the Public Interest Questions, Decision of Which Was Relied Upon as Essential Bases of the Judgment, In Addition to the Relief Granted, Prevent Maintenance of This Suit*

Whether or not the relief granted by itself prevents maintenance of this suit, on the theory either that it involves setting aside a Commission order contrary to Section 402(a), or runs counter to paramount federal policy for the control of broadcasting, the judgment must be set aside since it was founded upon the decision of public interest questions.

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[30] See Act of February 4, 1887, to Regulate Commerce, 24 Stat. 379 (as amended by Section 7 of the Act of June 18, 1910, 36 Stat. 539, 544-545), Section 22.

From the analysis of the Nebraska court's decision given above (pp. 44-58) and the Commission decisions there cited, it is clear that the Commission had a paramount concern, from the standpoint of public interest, in the very financial and managerial arrangements found inadequate by the Nebraska Supreme Court, ostensibly from the standpoint of supposed private rights. The data on past earnings, rental payments, the security behind the transaction, Gillin's position as manager of the station, his status as a stockholder and his predominant position in the lessee corporation, all these factors, relied on by the court, were clearly relevant to the Commission's functions under the language of the Communications Act and involved questions which the Commission itself was called upon to take into account and weigh in authorizing the transfer of the station. And these factors, as well as others relied upon by the court in evaluating the leased property, required the investigation, analysis and appraisal which only the expert body in a highly technical and specialized field is qualified to give. This, we seriously submit, is evident from the opinion below.

Reliance upon the decision of even a single public interest question as an essential ingredient of the court's judgment would seem to require its reversal. In this case, there are no separate or alternative bases for the decision (see *supra*, pp. 44-60) and every ingredient of the judgment involves the decision of such questions.

In another aspect of the case, the court's decision involves an invasion of the Commission's sphere and the determination of public interest questions. If permitted to stand, it would effectively prohibit (certainly so far as the transfer of any broadcast station in Nebraska may be involved) any future transfer which does not meet its own standards of adequacy of price, financial stability of the transferee, the compensation of the transferee's manager and his present and past interest in the station, etc. No matter how firm a judgment the Commission may reach as to the desirability of a transfer in the public interest, hereafter its discretion would be limited by the conclusions

of the Nebraska court. And presumably, in the future, in a multitude of cases, it would be bound by the conclusions of the courts of all States. The decision thus would remove a large and essential area within which the Commission's determination of public interest may operate and would tend to break down Congressional and regulatory standards of great significance to the public.

These questions, therefore, were matters falling within the primary jurisdiction of the Commission to determine. The so-called "doctrine of primary jurisdiction" is clearly applicable here. It has been applied to such functions as those of the Interstate Commerce Commission in the field of railroad rates (*Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426; *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285; *Armour & Co.* v. *Alton R.R.*, 312 U.S. 195; *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S. 422), and pipeline joint rate divisions (*Marony* v. *Applegate*, 266 App. Div. 412, 42 N.Y.Supp.(2d) 768 (1943); the United States Shipping Board in the field of ocean carriage (*United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474); the Civil Aeronautics Board in the field of airplane flight regulations (*Adler* v. *Chicago & Southern Air Lines, Inc.*, 41 F.Supp. 366 (D.Mo. 1941); and to the various boards dealing with labor relations (*Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Stanley* v. *Peabody Coal Co.*, 5 F. Supp. 612 (D. Ill. 1933); *Montana State Federation of Labor* v. *School Dist. No. 1*, 7 F.Supp. 82 (D. Mont. 1934). *Cf. Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210.

The theory underlying the rule was perhaps best stated in *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291:

> "Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but

the *character of the controverted question and the nature of the inquiry necessary for its solution.* To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. *It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts.*"

The rule would seem peculiarly applicable to the functions vested in the Communications Commission—since the Communications Act gave the Commission "not niggardly but expansive powers" in a field "the dominant characteristic of which was the rapid pace of its unfolding" and a need for special vigilance to "encourage the larger and more effective use of radio in the public interest". *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219. Here, the plaintiff should have submitted his public interest questions to the Commission for its expert consideration, and if dissatisfied with its action and desirous of relief nullifying it, appealed to the Federal courts pursuant to section 402(a). *Cf.*, concurring opinion of Lehman, J., in *New York* v. *New York Central R.R.*, 275 N.Y. 287, 296-297, 9 N.E.(2d) 931 (1937); *Ford* v. *Oregon Elec. Ry.*, 60 Ore. 278, 117 Pac. 809 (1911); *Corstvet* v. *Bank of Deerfield*, 220 Wis. 209, 263 N.W. 687 (1936); *Village of Mantorville* v. *Chicago, Great Western R.R.*, 8 F.Supp. 791 (D. Minn. 1934). See also *Beasley* v. *Texas & Pac. Ry.*, 191 U.S. 492, 497-498.

Conclusion

We submit, therefore, that the judgment below should not be permitted to stand. The decision rests upon public interest questions which were either directly involved in the Commission's decision approving the transfer, or which, if presented to the Commission would have been passed upon as relating to the ultimate issue of "public interest, convenience or necessity", pending before the Commission. The judgment, therefore, invades the Commission's jurisdiction, and annuls and sets aside the Commission's order contrary to Section 402(a) of the Act. The suit, therefore, could not be maintained in a State court, for in addition to nullifying administrative action contrary to the federal scheme for a single, unified control of broadcasting, the decree is predicated upon the decision of public questions directly at odds with that of the administrative body itself. It is submitted that such a thwarting of federal public policy should not be permitted, and that the judgment should be reversed with directions that the petition be dismissed.

Respectfully submitted,

James Lawrence Fly
Attorney for the Petitioners

Francis P. Matthews
Rainey T. Wells
Monroe Oppenheimer
Peter Shuebruk
Raymond M. Crossman
Earl Cline
Robert W. DeVoe
Paul P. Massey
William P. Kelley
Of Counsel

February, 1945

APPENDIX A

APPLICABLE SECTIONS OF THE COMMUNICATIONS ACT

(150 Stat. 189, 47 U. S. C., Section 151)

SECTION 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication,[1] and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a Commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

SECTION 2. (a) The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; . . .

SECTION 3. (b) "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, includ-

[1] The provision relating to the promotion of safety of life and property was added by "An Act to amend the Communications Act of 1934, etc.". Public No. 97, 75th Congress, approved and effective May 20, 1937, 50 Stat. 189.

ing all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(d) "Transmission of energy by radio" or "radio transmission of energy" includes both such transmission and all instrumentalities, facilities, and services incidental to such transmission.

(k) "Radio station" or "station" means a station equipped to engage in radio communication or radio transmission of energy.

SECTION 4. (i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. . . . Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. . . .

SECTION 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

SECTION 303. (c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each

individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(r)[17] Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

SECTION 304. No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

SECTION 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be

[17] This subsection was added by "An Act to amend the Communications Act of 1934, etc." Public No. 97, 75th Congress, approved and effective May 20, 1937; 50 Stat. 191.

for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

SECTION 308. (a) The Commission may grant licenses, renewal of licenses, and modification of licenses only upon written application therefor received by it: . . .

(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

SECTION 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served

by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding.

(b)(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

SECTION 319. (a) No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission upon written application therefor. The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation.

(b) Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee. The rights under any such permit shall not be assigned or otherwise transferred to any person without

the approval of the Commission. . . . Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstanee arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit.

APPENDIX B

LICENSE OF STATION WOW, DATED NOVEMBER 6, 1942, WHICH COMMISSION AUTHORIZED TO BE ASSIGNED FROM WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY TO RADIO STATION WOW, INC.

File No. B4-S-686
Official No. 686
Call letters WOW

UNITED STATES OF AMERICA

FEDERAL COMMUNICATIONS COMMISSION

RADIO BROADCASTING STATION LICENSE

Modified as of November 6, 1942.

Subject to the provisions of the Communications Act of 1934, subsequent acts, and treaties, and all regulations heretofor or hereafter made by this Commission; and further subject to conditions set forth in this license, the LICENSEE WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY is hereby authorized to use and operate the radio transmitting apparatus hereinafter described for the purpose of broadcasting for the term beginning December 1, 1942 (3 a. m., Eastern Standard Time), and ending June 1, 1944 (3 a. m., Eastern Standard Time).

The licensee shall use and operate said apparatus only in accordance with the following terms:

1. On a frequency of 590 kc.

2. With power of 5 kilowatts, with an additional xxx watts from local sunrise to local sunset only. Antenna current 6.82 amperes for 5 kilowatts; xxx amperes for xxx watts. Antenna resistance 107.7 ohms.

3. During the following period or periods of time: Unlimited time.

4. Under the call letters WOW.

5. With the main studio of the station located at: 2nd Floor, Insurance Building, 17th & Farnam Streets, Omaha, Nebraska.

The apparatus hereinabove authorized to be used and operated is located at:

56th & Kansas Avenue,	Lat.	41°	19′	00″	North,
Omaha, Nebraska.	Long.	95	59	52	West.

and is described as follows: WESTERN ELECTRIC, Type D-96847 Broadcasting Transmitter. Direct Crystal Control. Last radio stage: two 2.5-kilowatt vacuum tubes for low level modulation (Federal 126-A). Maximum rated carrier power output 5 kilowatts. Antenna: Type—guyed uniform cross section vertical radiator; vertical lead, 454 feet; overall height, 458 feet. Ground system: 120 radials #10 copper wire each 400′ long buried 12″ and centered at base of antenna.

Tower painted and lighted in accordance with specifications dated 8-8-39, said specifications to be posted by the licensee with this license (Sec. 3.401).

The Commission reserves the right during said license period of terminating this license or making effective any changes or modification of this license which may be necessary to comply with any decision of the Commission rendered as a result of any hearing held under the rules of the Commission prior to the commencement of this license period or any decision rendered as a result of any such hearing which has been designated but not held, prior to the commencement of this license period.

This license is issued on the licensee's representation that the statements contained in licensee's application are true and that the undertakings therein contained so far as they are consistent herewith, will be carried out in good faith. The licensee shall, during the term of this license, render such broadcasting service as will serve public interest, convenience, or necessity to the full extent of the privileges herein conferred.

This license shall not vest in the licensee any right to operate the station nor any right in the use of the fre-

quency designated in the license beyond the term hereof, nor in any other manner than authorized herein. Neither the license nor the right granted hereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934. This license is subject to the right of use or control by the Government of the United States conferred by section 606 of the Communications Act of 1934.

Dated this 6th day of November, 1942.

By direction of the FEDERAL COMMUNICATIONS COMMISSION,

T. J. SLOWIE
Secretary.

[SEAL]
bdr

APPENDIX C

LICENSES OF STATION WOW, ISSUED TO RADIO STATION WOW, INC., EFFECTIVE FEBRUARY 17, 1943, AND JUNE 1, 1944, RESPECTIVELY

File No. B4-Z-1494
Official No. 686
Call letters WOW

UNITED STATES OF AMERICA

FEDERAL COMMUNICATIONS COMMISSION

RADIO BROADCASTING STATION LICENSE

Modified as of February 17, 1943.

Subject to the provisions of the Communications Act of 1934, subsequent acts, and treaties, and all regulations heretofor or hereafter made by this Commission, and further subject to conditions set forth in this license, the LICENSEE RADIO STATION WOW, INC. is hereby authorized to use and operate the radio transmitting apparatus hereinafter described for the purpose of broadcasting for the term beginning February 17, 1943, and ending June 1, 1944 (3 a. m., Eastern Standard Time).

The licensee shall use and operate said apparatus only in accordance with the following terms:

1. On a frequency of 590 kc.

2. With power of 5 kilowatts, with an additional xxx watts from local sunrise to local sunset only. Antenna current 6.93 amperes for 5 kilowatts; xxx amperes for xxx watts. Antenna resistance 104 ohms.

3. During the following period or periods of time: Unlimited time.

4. Under the call letters WOW.

5. With the main studio of the station located at: 2nd Floor, Insurance Building, 17th & Farnam Streets, Omaha, Nebraska.

The apparatus hereinabove authorized to be used and operated is located at:

56th & Kansas Avenue, Omaha, Nebraska.	Lat.	41°	19′	00″	North,
	Long.	95	59	52	West.

and is described as follows: WESTERN ELECTRIC, Type D-96847, Broadcasting Transmitter. Direct Crystal Control. Last radio stage: two 2.5-kilowatt vacuum tubes for low level modulation (Federal 126-A). Maximum rated carrier power output 5 kilowatts. Antenna: Guyed uniform cross-section vertical radiator; height of vertical lead, 454′; overall height above ground level, 458′. Ground system consists of 120 radials #10 copper wire, each 400′ long, buried 12″ and centered at base of antenna.

Tower painted and lighted in accordance with specifications dated 8-8-39, said specifications to be posted by the licensee with this license (Sec. 3.401).

The Commission reserves the right during said license period of terminating this license or making effective any changes or modification of this license which may be necessary to comply with any decision of the Commission rendered as a result of any hearing held under the rules of the Commission prior to the commencement of this license period or any decision rendered as a result of any such hearing which has been designated but not held, prior to the commencement of this license period.

This license is issued on the licensee's representation that the statements contained in licensee's application are true and that the undertakings therein contained so far as they are consistent herewith, will be carried out in good faith. The licensee shall, during the term of this license, render such broadcasting service as will serve public interest, convenience, or necessity to the full extent of the privileges herein conferred.

This license shall not vest in the licensee any right to operate the station nor any right in the use of the fre-

quency designated in the license beyond the term hereof, nor in any other manner than authorized herein. Neither the license nor the right granted hereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934. This license is subject to the right of use or control by the Government of the United States conferred by section 606 of the Communications Act of 1934.

Dated this 17th day of February, 1943.

By direction of the FEDERAL COMMUNICATIONS COMMISSION,

T. J. SLOWIE
Secretary.

[SEAL]
tgn

File No. B4-R-686
Official No. 686
Call letters WOW

UNITED STATES OF AMERICA

FEDERAL COMMUNICATIONS COMMISSION

RADIO BROADCASTING STATION LICENSE

Subject to the provisions of the Communications Act of 1934, subsequent acts, and treaties, and all regulations heretofor or hereafter made by this Commission, and further subject to conditions set forth in this license, the LICENSEE RADIO STATION WOW, INC. is hereby authorized to use and operate the radio transmitting apparatus hereinafter described for the purpose of broadcasting for the term beginning June 1, 1944 (3 a. m., Eastern Standard Time), and ending May 1, 1946 (3 a. m., Eastern Standard Time).

The licensee shall use and operate said apparatus only in accordance with the following terms:

1. On a frequency of 590 kc.

2. With power of 5 kilowatts, with an additional xxx watts from local sunrise to local sunset only. Antenna current 6.93 amperes for 5 kilowatts; xxx amperes for xxx watts. Antenna resistance 104 ohms.

3. During the following period or periods of time: Unlimited time.

4. Under the call letters WOW.

5. With the main studio of the station located at: 2nd Floor, Insurance Building, 17th & Farnam Streets, Omaha, Nebraska.

The apparatus hereinabove authorized to be used and operated is located at:

56th & Kansas Avenue,	Lat.	41°	19′	00″	North,
Omaha, Nebraska.	Long.	95	59	52	West.

and is described as follows: Western Electric, Type D-96847, Broadcasting Transmitter. Direct Crystal Control. Last radio stage: two 2.5-kilowatt vacuum tubes for low level modulation (Federal 126-A). Maximum rated carrier power output 5 kilowatts. Antenna: Guyed uniform cross-section vertical radiator; height of vertical lead, 454′; overall height above ground level, 458′. Ground system consists of 120 radials #10 copper wire, each 400′ long, buried 12″ and centered at base of antenna.

Tower painted and lighted in accordance with attached specifications.

The Commission reserves the right during said license period of terminating this license or making effective any changes or modification of this license which may be necessary to comply with any decision of the Commission rendered as a result of any hearing held under the rules of the Commission prior to the commencement of this license period or any decision rendered as a result of any such

hearing which has been designated but not held, prior to the commencement of this license period.

This license is issued on the licensee's representation that the statements contained in licensee's application are true and that the undertakings therein contained so far as they are consistent herewith, will be carried out in good faith. The licensee shall, during the term of this license, render such broadcasting service as will serve public interest, convenience, or necessity to the full extent of the privileges herein conferred.

This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequency designated in the license beyond the term hereof, nor in any other manner than authorized herein. Neither the license nor the right granted hereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934. This license is subject to the right of use or control by the Government of the United States conferred by section 606 of the Communications Act of 1934.

Dated this 23rd day of May, 1944.

By direction of the FEDERAL COMMUNICATIONS COMMISSION,

T. J. SLOWIE
Secretary.

[SEAL]

wrm

70226-4

B4-R-686 WOW 5-23-44

SPECIFICATION "A-3-a" MODIFIED

(Formerly Specification "B")

xxx (each) tower shall be painted throughout its height with alternate bands of international orange and white, terminating with international orange bands at both top and bottom. The width of the international orange bands shall

be from 30' to 40 feet. The white bands shall be approximately one-half the width of the international orange bands.

For night marking there shall be installed at the top of (each) tower a three-hundred m/m electric code beacon equipped with two five-hundred watt lamps (both lamps to burn simultaneously) and aviation red color shades. In addition, the code beacon (beacons) shall be equipped with a flashing mechanism producing not more than forty flashes per minute with a luminous period of one second and a period of darkness of one-half second, but not less than twenty flashes per minute with a luminous period of two seconds and period of darkness of one second.

On levels at approximately two-thirds and one-third of over-all height of the (each) tower, there shall be installed at least two one-hundred watt lamps, or equal illuminants, enclosed in aviation red fresnel or prismatic (heat resisting preferred) obstruction light globes. Each light shall be mounted so as to insure unobstructed visibility of at least one light at each level from aircraft at any angle of approach.

All lighting shall be exhibited from dusk to dawn.

Nothing contained herein shall be construed as a finding by the Commission on the question of additional marking or lighting for the antenna system should future conditions require. Licensee expressly agrees to install such marking or lighting as the Commission may require under the provisions of Section 303 (q) of the Communications Act of 1934, as amended.

In the event further developments should indicate the need for additional marking, a 24-inch rotating beacon on the highest station building and/or a radio marker beacon may be required.

APPENDIX D

BALANCE SHEET AND INCOME STATEMENT OF STATION WOW, SUBMITTED BY WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY, ASSIGNOR, IN CONNECTION WITH APPLICATION FILED IN THE COMMISSION FOR CONSENT TO ASSIGNMENT OF LICENSE FOR RADIO STATION WOW, INC. (FILE No. B4-AL-354) (SEE R. 376, 386)

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C.

FCC Form 329

(March 1941—supersedes FCC Form 706)

Exhibit 3

BALANCE SHEET

As at September 30, 1942

Show all amounts to the nearest dollar only, i.e., do not report cents.

Executed by or on behalf of:

W.O.W. Radio Station owned and operated by Woodmen of the World Life Insurance Society.
(Exact name of person or entity whose balance sheet appears herein)

Insurance Building, Omaha, Nebraska
(Regular business address)

I hereby certify that I am the person for whom this balance sheet is filed with the Federal Communications Commission or am authorized to execute this document for that person.[1] I further certify that I have reviewed carefully

[1] May be signed by a person other than one for whom the balance sheet is prepared if accompanied by appropriate explanation of authority to do so, as well as authenticated copies of documents on which such authority rests if such documents are not on file with the Commission. If on file, reference to such documents may be made in lieu of submitting copies thereof. If submitted as part of an application it may be signed only; if submitted separately, it must be signed and sworn to before a proper officer.

all items on this balance sheet and that it reflects the true, accurate, and complete financial condition of the person for whom filed as at the date shown above, appropriate accounting classifications alone excepted.

FORREST NEWBERRY,
(Signature)

Secretary
(Relationship to person for whom filed)

Insurance Bldg., Omaha, Nebraska
(Regular business address of person signing)

Subscribed and sworn to before me this 3rd day of October, 1942.

(SEAL) CLARA CHESNEAU,
Notary Public

My commission expires June 28, 1943.

Must be submitted in triplicate. Swear to at least two copies.

GENERAL BALANCE SHEET—ASSET SIDE

Line No.	Particulars		Amount
1	CURRENT ASSETS AND ACCRUALS		
2	Cash		$ 106.00
3	Temporary cash investments		
4	Notes and accounts receivable		47,935.00
5	Other current assets		
6	Total current assets and accruals		$
7	INVESTMENTS—BROADCAST[2]		
8	Tangible property owned and devoted exclusively to broadcast service (for description see Schedule 4 of FCC Form No. 324)	$108,591	
9	Less depreciation allowance	56,939	$ 51,652.00
10	Intangible property owned and devoted exclusively to broadcast service (for description see Schedule 5 of FCC Form No. 324)	$	
11	Less amortization allowance (Goodwill)		$ 1.00
12	Total Investments—Broadcast		$
13	INVESTMENTS—NONBROADCAST		
14	Land		$ 14,129.00
15	Buildings and extension in process	$ 43,974	
16	Less depreciation allowance	6,883	$ 37,091.00
17	Other fixed assets		
18	Securities 434 Shares Broadcast Music Inc		2,170.00
19	Other investments		
20	Intangible property	$	
21	Less amortization allowance		$
22	Total Investments—Nonbroadcast		$
23	AMOUNTS RESPECTING AFFILIATED INTERESTS		
24	Notes and accounts receivable from affiliated companies		$
25	Notes and accounts receivable from partners, stockholders, officers and employees		
26	Investments in securities of an advances to affiliated companies		

[2] The net amount of these items must agree with the depreciated value in schedule of inventory in cases of applications for assignment of construction permit or license and transfer of control.

27	Advance to partners, stockholders, officers and employees		
28	Total amounts respecting affiliated interests	$	
29	PREPAYMENTS, DEFERRED CHARGES, AND UNCLASSIFIED DEBIT BALANCES		
30	Prepaid payrolls	$	
31	Other prepayments Insurance	$	1,500.00
32	Capital stock discount and expense		
33	Unamortized debt discount and expense		
34	Other deferred charges and unclassified debit balances		
35	Total prepayments, deferred charges and unclassified debit balances	$	
36	OTHER ASSET SIDE AMOUNTS		
37	Other assets	$	
38	Total asset side amounts		$154,584.00

GENERAL BALANCE SHEET—LIABILITY SIDE

Line No.	Particulars		Amount
39	CURRENT LIABILITIES AND ACCRUALS		
40	Unpaid Payrolls		$ 6,573.00
41	Notes and accounts payable		10,649.00
42	Matured long-term debt unpaid		
43	Accrued interest, rents, and similar items payable		
44	Federal income and other taxes payable		
45	Other current liabilities and accruals		
46	Total current liabilities and accruals		$ 17,222.00
47	LONG-TERM DEBT		
48	Bonds actually issued	$	$
49	Deduct: Bonds reacquirred	$	$
50	Other long-term debt		$
51	Total long-term debt		$
52	PROVISION FOR DEFERRED PAYMENTS, DEFERRED CREDITS AND UNCLASSIFIED CREDIT BALANCES		
53	Provision for employee pensions and welfare		$
54	Other deferred credits and unclassified credit balances		$
55	Total provisions for deferred payments, deferred credits and unclassified credit balances		$
56	AMOUNTS RESPECTING AFFILIATED INTERESTS		
57	Notes and accounts payable to affiliated companies		$
58	Notes and accounts payable to partners, stockholders, officers and employees		
59	Advances from affiliated companies		
60	Advances from partners, stockholders, officers and employees		
61	Total amounts respecting affiliated interests		$
62	CAPITAL (OR NET WORTH)		
63	(a) For a corporation:		
64	Capital stock—Issued	$	
65	Less treasury stock		
66	Balance, capital stock outstanding		$
67	Capital stock, subscriptions and installment purchase commitments		
68	Total capital stock		$

69	Surplus—		
70	Capital Surplus—Paid in	$	
71	Arising from revaluation		
72	Other surplus amounts		
73	Total capital surplus	$	
74	Earned Surplus—Reserves established under requirements in contracts	$	
75	Reserves for contingencies and other discretionary purposes	$	
76	Unappropriated earned surplus (deficit indicated by red)		
77	Total earned surplus	$	
78	Total capital stock and surplus amounts	$	
79	(b) For an individual or a partnership:		
80	Proprietorship or partnership capital	$	
81	Undistributed profits (deficit indicated by red)		
82	Total net worth		$137,362.00
	Total liability side amounts		$154,584.00

A (1) Nature and amount of contingent liabilities not included in the balance sheet..... None

(2) Amount per share of cumulative dividends in arrears ..... None

(3) Amount of default in principal, interest, or sinking-fund provisions of funded debt..... None

(4) Explain the nature of any contingent liability shown and describe fully the reason for dividends in arrears and default in payment of funded debt:

.....

.....

.....

B (1) Was any asset shown on the foregoing balance sheet acquired in any manner other than:

(1) through purchase with funds acquired in the ordinary course of business, or

(2) by issuance of capital stock, or (3) by issuance of evidence of indebtedness shown on the balance sheet? Answer: No.

(2) If the answer is "yes", describe each such asset and state the time and manner of acquisition and from whom acquired:

.....

.....

.....

C (1) Is this a consolidated balance sheet, i.e., are amounts included with respect to more than one company or other person? Answer: No.

Note: For the purpose of reconciliation of this statement with the one furnished to F.C.C. at the end of the year it should be stated that in this statement rates of depreciation are those used by the Federal Revenue Bureau. Rates of depreciation used in annual statement to F.C.C. show tangible property totally written off as required by the Insurance Departments governing Fraternal Life Insurance Societies.

(2) If the answer is "yes", identify each person whose amounts are included:

.....

.....

.....

WOW—EXHIBIT 2.

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C.

FCC Form 328
(March 1941—supersedes FCC Form 705) Exhibit

Federal Communications Commission
Oct 8 - 1942
Office of Secretary

INCOME STATEMENT

Executed by or on behalf of: Radio Station W.O.W. Owned and operated by

Woodmen of the World Life Insurance Society.
(Exact name of person or entity whose income statement appears hereon)

17th & Farnam Streets, Omaha, Nebraska
(Regular business address)

For the period

Begun Jan. 1, 1942 and ended Sept. 30, 1942

Show all amounts to nearest dollar only, i. e., do not report cents.

Line No.	Particulars		Amount
(1)	(2)		(3)
1	INCOME		
2	Salaries, wages, commissions		$
3	Rents		
4	Dividends		
5	Interest		
6	Broadcast income (Time)		426,408.93
7	Other income (itemize):		
8	Sale of Talent	$ 22,920.47	
9	Production, etc.	34,956.36	
10	Remote facilities	125.50	
11	Incidental revenues	2,795.85	
12			
13			
14			60,798.18
15	Total income (lines 2 to 14, inclusive)		$487,207.11

16	DEDUCTIONS FROM INCOME		
17	Interest		$ .....
18	Rents		.....
19	Taxes (other than Federal income tax)		.....
20	Other deductions from income (itemize):		
21	Technical Expenses	$ 48,089.35	
22	Program Expenses	81,353.29	
23	Selling Expenses	48,182.62	
24	General and Administrative		
25	Expenses	100,600.70	
27	Total (lines 17 to 26, inclusive)		$278,225.96
28	Net income for the period before Federal income tax (line 15 minus line 27)		None
29	Federal income tax	None	
30	Contractual reservations of income	None	
31	Total Federal income tax and reservations (lines 29 to 30)		None
32	NET INCOME FOR THE PERIOD (line 28 minus 31)		$208,981.15

Must be submitted in triplicate. Swear to at least two copies.

APPENDIX E

BALANCE SHEET OF RADIO STATION WOW, INC., ASSIGNEE, SUBMITTED IN CONNECTION WITH THE APPLICATION FILED IN THE COMMISSION FOR CONSENT TO ASSIGNMENT OF LICENSE FROM WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY (FILE NO. B4-AL-354) (SEE R. 376, 406)

RADIO STATION WOW INCORPORATED

OMAHA, NEBRASKA

Balance Sheet

October 20, 1942

Assets

Cash	$ 75,500
Guaranteed accounts receivable	25,000
Total Assets	$100,500

Liabilities

Capital Stock—Common (1000 shares) Par	$ 1,000
Preferred Stock—Class A (750 shares) Par	750
Preferred Stock—Class B (250 shares) Par	250
Surplus Paid-in	73,500
Surplus—Donated	25,000
Total Liabilities	$100,500

State of Nebraska }
County of Douglas } ss

I, John J. Gillin, Jr., President of Radio Station WOW Incorporated, do hereby certify that the foregoing statement sets forth correctly the financial condition of the afore-mentioned corporation.

John J. Gillin, Jr.

Subscribed and sworn before me this 20th day of October, 1942.

Clara Chesneau.